Argued 1-283
Dec 1. 1875

Jurisdiction
Affirmed
without prejudice

4 Dall 290 —
11 Gray 364

Miller

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES

No. ~~273.~~ 61 —

THE WESTERN UNION TELEGRAPH COMPANY, APPELLANT,

vs.

THE WESTERN AND ATLANTIC RAILROAD COMPANY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF GEORGIA.

FILED OCTOBER 17, 1873.

Code of Ga 1873
167

Laws of
Ga. 70 N 53

Dis'd. without prejudice
Miller J. Swayne

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1 UNITED STATES OF AMERICA,
Northern District of Georgia:

To the judge of the district court of the United States for the northern district of Georgia:

The Western Union Telegraph Company, a corporation created by the State of New York, and having its principal office and place of business at the city of New York, in that State, and being therefore a citizen of the said State of New York, brings this its bill against the Western and Atlantic Railroad Company, a body-corporate created by the State of Georgia, having its principal office and place of business at Atlanta, in the northern district aforesaid, and being therefore a citizen of the State of Georgia.

And thereupon your orator complains and says, on or about the eighteenth day of August, in the year one thousand eight hundred and seventy, your orator being engaged in the business of telegraph-
2 ing, and owning a line of magnetic telegraph extending from Atlanta, in the State of Georgia, to Chattanooga, in the State of Tennessee, entered into a written contract with the then superintendent of the Western and Atlantic Railroad of the State of Georgia, with the approval of his excellency the then governor of said State, a copy of which contract is hereto annexed as a part of this bill, marked "Exhibit A."

The first stipulation in said contract was that your orator should set apart on its line of poles along said railroad a telegraph wire for the exclusive use of said Western & Atlantic Railroad. This stipulation your orator at once complied with. The second stipulation was for equipping said line of wire with the requisite instruments, batteries, and other necessary fixtures, and putting the same in complete working order. This, also, your orator complied with. The third stipulation was for running said wire into all the offices of said railroad along the line. This, also, was complied with, so far as the said superintendent wished or required. The fourth stipulation, relating to the setting apart said wire, and allowing certain messages to be transmitted free of charge, has also been complied with. The fifth
3 stipulation, relating to free transmission over other wires of your orator, when the wire specially set apart should be out of order, has also been complied with; or, at all events, there has been no violation of the same. And the sixth stipulation, as to franks or passes, has been complied with by your orator in every respect, up to and until long since the open disavowal by the defendant of any binding force as against said defendant in said contract.

Certain stipulations casting duties and devolving obligations upon said Western and Atlantic Railroad are also found in said contract after the foregoing six, among which attention is called particularly to the second, third, and fifth. The second requires the said railroad to transport free of charge for your orator poles, wire, and other material, and to distribute the same where wanted. The third requires the said railroad to supply certain franks and passes to the officers and agents of your orator, and to transport them, upon the production of such franks and passes, in any of the passenger trains of said railroad, and put them off at any station, or at any discovered break of the tele-
4 graph. The fifth requires said railroad to receive for transmission and send over the wires and deliver to address at the railroad telegraph offices, in town, or at stations where your orator may have no

offices, all commercial or other messages, paid or unpaid, offered under the rules of your orator, and make monthly reports thereof, and pay over monthly to your orator all the tolls collected thereon, and to cause the operators and agents of said railroad to observe all the rules and regulations of your orator with respect to the monthly reports of business, and payment of all receipts thereon.

Special attention is also called to that part of the sixth stipulation above referred to, which declares that your orator shall be entitled to charge up and keep accounts of all such messages transmitted by said railroad to or from any point off the line of said road, and to collect therefor one-half of the usual rates on all such business after deducting the sum of two hundred dollars in each month.

The said contract was observed and complied with by the said railroad, so long as the said road remained in the hands or under the
5 immediate control of the State of Georgia, in whom was and still is the ownership of the said railroad; and the recital in the said contract to the effect that said railroad was a corporation at the date of said contract is an error, and was introduced by mistake of the draftsman.

In pursuance of a statute of the State of Georgia, the said railroad was, on or about the twenty-fifth day of December, in the year 1870, leased (whilst the contract aforesaid was in full force) to certain persons for the term of twenty years, and said lessees became by operation of said statute, a body corporate and politic by the name of the Western and Atlantic Railroad Company, which company is the defendant in this bill.

The said defendant, by virtue of said lease, on or about the twenty-seventh day of December, 1870, entered into possession of said railroad, with all its rights and privileges, including the right to use the aforesaid wire, and the instruments, batteries and other necessary fixtures with which the same had been equipped by your orator. And the said defendant, with your orator's approbation, commenced the use of said
6 wire, instruments, batteries, and other fixtures; and has, from about the day and year last aforesaid, up to the present time, had the free, full, and exclusive use of the same, with no exception but as may be hereinafter stated. The said defendant has taken and received all the benefits of said contract until very recently, as fully as they were enjoyed by the said railroad or by the State prior to the execution of said lease; and it is by virtue of said contract, and that alone, that the said defendant had any valid right or claim to said benefits; the said defendant coming in for the same under the State or under the Western and Atlantic Railroad, and having all the rights and privileges of its predecessor, and not being possessed by virtue of any new agreement or contract with your orator of any other or different rights and privileges whatsoever. Your orator was willing, and still is willing, for the said defendant to occupy in every respect the place of its lessor in the contract.

In the belief and with the expectation (on the part of your orator's officers) that the said defendant, whilst taking the benefits of said contract, would, or should, also submit to its burdens, your orator continued
7 to grant the same advantages to the defendant after the lease that had been accorded to the State or the said railroad before, and was careful to comply with and abide by said contract in all its terms. Acting in this spirit and with these views, your orator not only permitted the said defendant to retain and use said wire, with its equipments of every kind, but did a large amount of telegraph-

ing for said defendant, under the sixth stipulation above referred to, without charge, and the defendant accepted the said service, and took the benefit thereof. And in further execution of said sixth stipulation, your orator, between the date of said lease and the first day of September last past, did for said defendant telegraphing chargeable at half rates, according to said stipulation, to the amount, (after deducting the two hundred dollars in the month,) of about two hundred and ninety-four dollars and ninety-eight cents, which amount has been demanded of the said defendant, and which it wholly refuses to pay, basing the refusal on a total denial of the binding force of said contract as against
8 the defendant, and on the further alleged fact that similar exactions are not made of other railroad companies whose lines connect at Atlanta.

After making several prior demands for said amount, or portions thereof, and being refused payment, your orator made a last and final demand for the same on or about the first of October last past, and being again refused, and it being apparent that said defendant recognized no liability whatever for said account, or for similar items based on service under said contract, and, indeed, that said defendant wholly repudiated and disavowed any obligation on its part to abide by or perform the terms of said contract, and more especially that it would not and did not intend to settle for future work (any more than for past work) on the basis of the contract, your orator, through the proper officer, issued an order, on the third day of February, 1872, to discontinue such work to and from stations off of defendant's railroad, except on receipt of regular rates. This order was right and altogether justifiable. It was not made until after the defendant had broken the contract by repeated refusals to comply, nor until after reliable information that de-
9 fendant professed to owe no allegiance to the contract. Nor when made was it extended beyond the precise subject-matter of the breach. Defendant would not pay on the basis of the contract for a certain class of work; therefore your orator stopped doing that class of work unless the defendant would pay for it on the same basis with the public at large. But your orator left the contract to operate in every other particular, if the defendant would have abided by it; but such was not the defendant's pleasure.

On the fifth day of February, 1872, the said defendant, by its president, Joseph E. Brown, issued an order, which is still in force, denying to your orator the transmission of any message through the defendant's telegraphic agents; denying also to your orator the privilege of having any office or agent in any depot of the said defendant; directing that all tickets that had been issued to your orator's officers or agents be taken up, and that your orator's officers, agents, and employees be charged full fare for passing over the defendants' road, and that none of them be permitted to pass on freight trains; directing, also, that no tele-
10 graph material of any character be transported over said road for less than full rates of freight, nor in any case be delivered at any point other than a regular depot, and opening to the public the use of the said wire, under the defendant's care and control, both for the extreme points of Atlanta and Chattanooga and the intermediate stations, with directions to collect customary rates for the same, and pay the money into defendant's treasury.

This order is flagrantly violative of both letter and spirit of the aforesaid contract, and the defendant has put, and now continues, the same in force to drive your orator into an abandonment of said contract, and in the hope of dictating to your orator conditions less onerous to the de-

fendant and less advantageous to your orator. The said order even goes to the length of setting up, by means of the wire set apart for the exclusive use of said railroad, a rival business to compete with your orator in your orator's regular calling, inasmuch as your orator has offices, and had at the date of said contract, at Atlanta, Chattanooga, Dalton,
11 and Kingston, and had, and still has, as against the defendant, the exclusive right to send and receive telegraphic messages at those points sent by the public, and intended to pass up or down the line of telegraph erected along defendants' road. Your orator not only complains of this encroachment on its rights and business as being a breach of contract by defendant, but as being the exercise of an assumed power not conferred by defendant's charter. The defendant is a railroad company, and has no right to engage in telegraphing for the public.

Your orator charges that, in the execution of said order, the said defendant, by its operators, agents, and employees, has carried on the business of telegraphing for the public, charging and collecting compensation therefor and retaining the money, but to what extent, and what the proceeds amount to, this complainant cannot allege.

The defendant, as already shown, denies that said contract has any binding force upon it, and, acting upon that theory, it refuses to pay your orator for telegraphing at contract rates; it withdraws all free tickets, and requires full fare from your orator's officers, agents,
12 and employees; it ceases to carry telegraph material of any kind for your orator free, and charges therefor full rates; it ceases to distribute said material where needed, but restricts delivery to regular stations; it refuses to transmit for your orator any dispatches; it enters into competition with your orator for the general business of the public, and it no longer pays to your orator its collections for dispatches, but draws them into its own treasury.

These considerations induced your orator to treat as revoked and withdrawn all power and privilege on the part of the defendant to use said wire or the batteries, instruments, and fixtures therewith connected, and all authority to send or receive messages by means of the same, or to collect or receive compensation therefor, and accordingly your orator has sought to resume full possession and exclusive control of said wire, but has been hindered and obstructed by said defendant in so doing.

On the ninth day of February, 1872, the said defendant, by its agent at Dalton, George C. Conner, gave notice to one of your orator's agents that an attempt to cut said wire out of the defendant's
13 office would be resisted with force; and your orator charges that it is the design and purpose of the defendant's officers and agents to make forcible resistance to any and every such attempt at Marietta, Atlanta, Acworth, Cartersville, Kingston, Calhoun, and Dalton, and Ringgold, at each of which points the said wire passes from the telegraph-poles of your orator into the depot or office of defendant. As matters now stand, the said defendant has no just claim in law or equity to the use or control of said wire; on the contrary, as will be seen by reference to said contract, the said wire is and ever has been the property of your orator, with a mere right to its use granted out by contract, which contract is by the defendant set at defiance. It is of the value of six thousand dollars, and rests throughout its whole length on the poles of this complainant, and defendant's possession of it is only at the points above stated, where it is connected with instruments situated in defendant's depots or offices. Said possession, such as it is, is
14 within the control of a court of equity by the writ of injunction, but is of a nature not to be the subject-matter of an action at

law, or if so at all, not with full and adequate redress to your orator's rights in the premises. Said wire is about one hundred and thirty-eight miles long, and defendant has much less than one mile of it in actual possession, the rest being, as above stated, suspended upon the poles of this complainant along with other wires in the exclusive control and use of complainant, but complainant can make no effectual use of said wire without separating it from defendant's offices.

The free and unobstructed use of said wire would be of great value to your orator, but such is the nature of the property, that such value cannot be estimated. It would undoubtedly yield a large income in tolls, and your orator ought to have an opportunity of using it to the best advantage, and securing the income, and keeping an accurate account of the same, all of which your orator is prevented from doing by the
15 said defendant. The damages thus caused to your orator by the said defendant are heavy, amounting to at least twenty-five hundred dollars, but from their nature cannot be accurately estimated beforehand or compensated by action at law. The said defendant certainly has no right to withhold said wire, or any part thereof, from your orator for the purpose of telegraphing for the public, and there is almost as little right to withhold it for any other purpose, seeing that the defendant has thrown off all the burthens of said contract. Nor could your orator, without an indefinite multiplicity of suits, obtain redress at law for the breaches of contract committed by the defendant as aforesaid, even if the contract had been expressly adopted by the defendant as its own. The officers, agents, and employés of your orator have or may have frequent occasion to pass over defendant's road; and to bring an action to recover back each payment of fare would be attended with great trouble and expense; so would it be to sue for and recover back freight paid on poles and other telegraph material; so would it be to proceed for damages for refusing to distribute such material; so would it be to sue for and recover damages for an unauthorized use
16 of said wire, or for the refusal to use it according to the contract, seeing that the instances falling under the general refusals on these heads are likely to be numerous and of very frequent recurrence.

The only full, complete, and adequate redress for your orator, therefore, is to obtain the undivided possession and use of said wire, with the instruments and fixtures connected therewith. This, as it is understood, has been accomplished at Chattanooga, but at all the other stations above enumerated the said defendant has that kind of possession which has been hereinbefore explained, and will, as your orator charges, interpose force to obstruct your orator in any unaided effort to sever said wire from said offices, or to resume possession of said instruments and batteries; and will also, unless prevented, continue to use said wire for both individual and public service, and to receive and appropriate the income therefrom.

Your orator is willing and hereby offers to do full and complete equity towards the said defendant touching all the premises.

17 To the end, therefore, that the said defendant, its officers, agents, servants, and employees, may be restrained from using said wire for any purpose whatever, and from receiving the earnings and income thereof; and may also be restrained from hindering, obstructing, or molesting your orator in the use thereof, or in severing said wire from each and all the offices or depots of said defendant with which it is connected, may it please your honor to grant the United States writ of injunction accordingly, directed to the said defendant, and

all its officers, agents, servants, and employees, giving them such command under an appropriate penalty.

That the writ of subpœna may also be issued, directed to the said Western and Atlantic Railroad Company, requiring it to be and appear at the next April rules, to make answer to all and singular the foregoing; and that your orator may have such other and further relief as the nature of the case requires.

L. E. BLECKLEY,
Sol. pro Complt.

18 NORTHERN DISTRICT OF GEORGIA:

I, Charles G. Meriwether, one of the superintendents of the Western Union Telegraph Company, do solemnly swear that the facts stated in the foregoing bill are true: So help me God.

CHARLES G. MERIWETHER.

Sworn to and subscribed before me this 14th February, 1872.
[L. S. OF COMMISSIONER.] W. B. SMITH,
U. S. Commissioner.

EXHIBIT A.

19 Articles of agreement, made and entered into by and between the Western Union Telegraph Company, a corporation under the laws of the State of New York, as party of the first part, and the Western and Atlantic Railroad Company, a corporation under the laws of the State of Georgia, as party of the second part, witnesseth:

That, in order to provide necessary telegraph facilities for the party of the second part, and to a better understanding of the terms on which the party of the first part shall occupy the line of railroad of the party of the second part with the line or lines of telegraph wires belonging to the party of the first part, and to permanently settle and define the business relations between the respective parties hereto, it is mutually contracted and agreed, in consideration of the respective obligations herein assumed, as follows, to wit:

The party of the first part agrees—

First. To set apart on its line of poles, along said railroad, a telegraph wire for the exclusive use of said party of the second part.

Second. To equip said line of wire with as many instruments, batteries, and other necessary fixtures as said party of the second part may
20 require for use in its railroad stations, and to put the same in complete working order.

Third. To run said wire into all the offices of said party of the first part along the line of said railroad.

Fourth. To have said wire set apart for the exclusive use of said railroad company in the transmission of messages on the business of said railroad on and along the line thereof; and all such messages originating at any point on said road, whether sent from or received at the stations of said party of the second part or the stations of said party of the first part, on said road, shall be transmitted and delivered free of charge.

Fifth. When the wire set apart to said railroad company shall not be in working order, to transmit free of charge over other wires of said telegraph company the messages of the officers and agents of the party of the second part on the business of said railroad company, between points on said road where said telegraph company may have stations, giving precedence to messages relating to the movement of trains over

any commercial or paid messages, so far as the statutes of the State or the United States may allow such precedence.

Sixth. To furnish such principal officers and agents of the party
21 of the second part as may be designated by application in writing of the general superintendent of said railroad company with annual franks or passes entitling them to send messages free over all the lines of the party of the first part: Provided, however, That said party of the first part shall be entitled to charge up and keep account of all such messages transmitted to or from any point off the line of said road of the party of the second part at its usual rates for the transmission of commercial messages, and for all of such account above the amount of two hundred dollars ($200.00) in any one month, said party of the second part shall pay one-half thereof, being half rates for all the business done over the lines of the said party of the first part above the said sum of two hundred dollars ($200.00) per month, or in any one month; and the party of the second part, in consideration of, and agreeing to all the foregoing, further covenants—

First. That the party of the first part shall have perpetual right of way to erect and maintain telegraph lines along said railroad of as many wires as it may deem necessary to its business, and additional lines of poles whenever the said party of the first part shall so elect, and
22 exclusive right of way so far as the said party of the second part has the power to grant or secure the same; and said party of the second part, if it has the right and power to refuse, will not transport poles, wire, or other material for any other telegraph company at less than full rates of freight thereon, nor distribute or unload the same at other than the regular railroad-stations of said road, and should a competing line of telegraph be established along said railroad, then the party of the first part shall be released from its stipulation to transmit free of charge any business of said railroad company off or beyond its line of road.

Second. To transport for said party of the first part, free of charge, all poles, wire, and other material required by said party of the first part for the construction, reconstruction, repairs, or maintenance, and operation of its lines, and distribute at the places required such poles, wire, and other heavy material as may be needed along the line of said railroad, either in the construction of additional lines or in the repair of the same, and of existing lines.

Third. To transport in any of its passenger trains the officers
23 and agents of the party of the first part, and put them off at any station on said road or at any discovered break of the telegraph wires, such officers or agents presenting franks or passes which shall be supplied at any ticket-office of said party of the second part on the application of a superintendent of the party of the first part.

Fourth. To maintain all such telegraph-stations as may be opened by or for the use and benefit of said railroad company at the exclusive cost of the party of the second part, to appoint its own operators thereat, but to retain no operator who refuses or persistently neglects to obey the rules and regulations of said party of the first part.

Fifth. To receive for transmission and send over the wires and deliver to address at the railroad telegraph-offices in town or at stations where the party of the first part may have no offices, all commercial or other messages paid or to be collected that may be offered under the rules of said party of the first part, and make monthly reports thereof, and pay over monthly to said party of the first part all the tolls collected thereon, and to cause the operators and agents of said party of the second

24 part to observe all the rules and regulations of the party of the first part with respect to the monthly reports of business and payment of all receipts thereon, and the regular rates of toll shall accrue to the party of the first part on any and all business received at or transmitted from the telegraph-stations of the party of the second part, except the legitimate railroad messages of the said party of the second part.

Sixth. To pay to said party of the first part the cost of constructing the wire herein designated and set apart to the exclusive use of said party of the second part, and the cost of equipping the same at the railroad-stations not already supplied with instruments, batteries, and other necessary fixtures, as soon as the cost thereof can be ascertained.

In witness whereof the parties hereto have by their proper officers and under their corporate seals duly executed this agreement this eighteenth day of August, 1870.

The Western Union Telegraph Company,
[L. S.] (Signed) By WILL'M ORTON, *President.*
Attest:
(Signed) GEORGE WALKER,
Sec'y pro tem.

25 The Western and Atlantic Railroad.
[L. S.] (Signed) By FOSTER BLODGETT.
Sup't W. & A. R. R.

Approved:
(Signed) RUFUS B. BULLOCK,
Governor.

By the governor:
[L. S.] (Signed) H. C. CARSON,
Sec'y Ex. Dep't.

Filed in office 14th February, 1872.
W. B. SMITH,
Clerk.

Let notice be given, according to law, to appear and show cause on next Tuesday, 20th in't, at 10 a. m., at U. S. court-room, Atlanta.
JOHN ERSKINE.

FEBR'Y 14, '72.

26 United States of America, northern district of Georgia.

THE WESTERN UNION TELEGRAPH COMPANY, complainant, *and* THE WESTERN AND ATLANTIC RAILROAD COMPANY, defendant. } In equity.

The President of the United States to the Western and Atlantic Railroad Company:

For certain causes offered before the judge of the district court of the United States for the northern district of Georgia, in equity, you are hereby commanded and strictly enjoined that, laying all other matters aside, and notwithstanding any other excuse, you personally be and appear at the clerk's office of the said court, in the city of Atlanta, at rules to be had on the first Monday in April next, to answer to those things which shall then and there be objected to you on behalf of the Western Union Telegraph Company, and to do further and receive what the

27 said court shall have considered in this behalf; and this you may in no wise omit under penalty of five hundred dollars, and have here this writ.

Witness the honorable John Erskine, judge of the district court of the United States for said district, this 14th day of February, in the year of our Lord one thousand eight hundred and seventy-two.

[L. S. OF THE COURT.] W. B. SMITH, *Clerk.*

MEM.—The defendant must enter its appearance in this suit to the clerk's office at Atlanta, on or before the first Monday in April next, or the bill will be taken pro confesso.

Service of subpœna and notice of motion for injunction acknowledged February 14, 1872.

POPE & BROWN,
Defdt.'s Sols.

The corporate character of complainant is admitted as alleged.

POPE & BROWN,
Defdt.'s Solrs.

28 In the district court of the United States for the northern district of Georgia.

THE WESTERN UNION TELEGRAPH COMPANY *vs.* THE WESTERN AND ATLANTIC RAILROAD Company. } In equity.

Answer.

Respondent, making the usual reservations, for answer, says: Respondent admits that complainant made with Foster Blodgett, former superintendent of the Western and Atlantic Railroad, the contract set up in complainant's bill, and that a correct copy of said contract is attached to said bill as an exhibit, but this respondent was not a party to said contract, as will appear by reference thereto; has never agreed to its terms, and has never in anywise accepted the same, and cannot be bound by any of its terms or conditions. This respondent had no existence as a corporation when said contract was made, and did not become incorporated until the Western and Atlantic Railroad was leased by respondents on the twenty-seventh day of December, A. D. eighteen hundred and seventy. By the fourth section of the act approved on the twenty-fourth day of October, A. D. eighteen hundred and
29 seventy, under which lease of said road to respondents was made, it is declared that respondent shall have the power to sue and be sued on all contracts made by respondent in any county through which said road runs, after the execution of said lease, or for any cause of action which accrued to respondent or to which respondent became liable after said lease was executed; and by the eighth section of the same act provision was made for paying all outstanding or floating debts or liabilities of the State of Georgia on account of said Western and Atlantic Railroad. Respondent submits that under the provisions aforesaid this respondent is in no way bound by any contract in existence before the making of the lease, a copy of which is hereto attached, marked "Exhibit A."

Respondent denies that it received the wire, instruments, batteries, and other fixtures described in complainant's bill under any contract with complainant, and denies ever having used the same under any such contract, and denies ever having done any act that was intended to be or that could fairly be construed to be an acceptance of said contract, or of any of its terms or stipulations; on the contrary, respondent
30 had no knowledge of the existence of any such contract, or of any contract at all between the complainant and the State of Georgia in regard to said wire, instruments, batteries, and fixtures until long after the same had been delivered to respondent as an appurtenance of the road under the lease aforesaid. And when the road and its appurtenances were turned over to respondent by Foster Blodgett, former superintendent, the said Blodgett called the attention of Joseph E. Brown, president of respondent, to said wire, instruments, batteries, and fixtures as one of the equipments or appurtenances of said road which belonged to respondent under the terms of the lease; and said Blodgett stated to said Brown that the State of Georgia had purchased and fully paid for the same; and the same was delivered by the said Blodgett then and there into the possession of respondent, and from that time henceforth was used by respondent as all other property of said road was, without any reference to any contract which the State may have previously made with parties for the purchase or use of the same. And said wire, instruments, batteries, &c., were invoiced to respond-
31 ent by the commissioners appointed to make out a schedule of said road and its appurtenances, and respondent stands charged and is responsible on its bond to the State for the same, as appears by reference to a part of said inventory hereto attached, marked "Exhibit B." Some time thereafter, Joseph E. Brown, president as aforesaid, incidentally heard of the existence of a contract between complainant and Foster Blodgett, as former superintendent, and as soon as convenient thereafter procured a copy of the same. This was the first information respondent had of the existence of said contract, and said Brown, as president, without unnecessary delay, notified William Orton, the president of complainant, that respondent was not a party to said contract, and would not be bound by it; and said Brown offered to make a contract similar to that made by complainant with other connecting roads of respondent's road, which said notice was received by said Orton, and said proposition was considered and rejected. A copy of said Brown's letter is hereto attached, marked "Exhibit C." It is true that after the notice aforesaid was given the officers and agents of complainant
32 were permitted to pass over the road of respondent free of charge, and on many occasions complainant was accommodated in the receipt and delivery of telegraph materials. But no privilege or accommodation was conceded to complainant as matter of right. The officers and agents of respondent were enjoying courtesies extended by complainant, such as are usual or would be proper if no contract had ever existed; and this respondent having given complainant the notice aforesaid, it would be a gross perversion of acts of pure civility to construe them into acceptance of an oppressive contract distinctly and emphatically repudiated by respondent.

Respondent avers that *that* the statement made by the said Blodgett to said Brown concerning the purchase of said wires, instruments, batteries, &c., by the State was true, and as evidence of the truth of said statement, respondent attaches hereto, marked "Exhibit D," a copy of the bills presented by complainant to the authorities of the State, and audited and paid out of the treasury of the State, as a liquidated de-

mand against the State under section eight of said act, approved on the twenty-fourth day of October, A. D. eighteen hundred and seventy, authorizing the said lease to respondent, together with a copy of the receipt of complainant for the amount of said bills. It appears by said receipt that complainant, on the twentieth day of January, A. D. eighteen hundred and seventy-one, being after the date of the lease, received out of the State treasury the sum of six thousand two hundred and sixteen dollars and nineteen cents in full payment for said wire, instruments, batteries, &c. Respondent is advised and believes it to be true that said wire, instruments, batteries, and fixtures were in the exclusive possession and use of the Western and Atlantic Railroad while said road was in the possession of the State and under its management, from the time the same was completed and set apart to the exclusive use of said road, and respondent positively avers that said wire, instruments, and batteries, &c., have been in the exclusive possession of respondent since the lease until respondent was dispossessed of a portion thereof in the State of Tennessee by judicial proceedings entirely ex parte, and in which respondent as yet has had no hearing. In view of the facts aforesaid, respondent submits to the court
34 whether it is not true that said wire, instruments, batteries, &c., are the property of the State of Georgia absolutely, and as such included in respondent's lease from the State, and if this is not true, whether respondent under the lease is not entitled at least to the exclusive use and possession of the same as against complainant. And respondent insists respectfully that complainant must seek redress from the State and not from this respondent for any damage or other liability growing out of said contract of complainant with Foster Blodgett as superintendent, &c. Respondent admits that orders were issued on the part of respondent and complainant, substantially as stated in complainant's bill, and respondent also admits that any effort on the part of complainant to take possession of said wire, instruments, batteries, &c., without due process of law, would be resisted by respondent with such force as respondent is advised would be proper in the protection of respondent's property.

In any view of the facts aforesaid respondent respectfully insists that complainant is not entitled to the possession of the wire, instru-
35 ments, batteries, &c., and to the money received from the State in payment of the same. If respondent is not entitled to the possession and use of said wire, instruments, &c., then respondent submits that it is entitled to the use of said money, and that no injunction ought to be granted until after said money has been paid over to respondent, to be used in the erection of another wire. Respondent avers that said money has neither been paid over nor tendered. Respondent believes and charges that it is complainant's intention to keep the money and to recover the wire, instruments, batteries, &c., also, which respondent submits would be allowing complainant to treat the contract it had with the State as rescinded without having given up the fruits of said contract. Inasmuch as respondent received said wire, with its appurtenances, from the State, and has been charged with it on the inventory, and is held by its bond to return the same or pay the value thereof at the expiration of the lease, respondent has, as against the State, the right either to the use of the wire or the money paid therefor in its stead; and respondent insists that it has the same right against the com-
36 plainant. Respondent avers that the interest upon the money received by the complainant from the State is more than sufficient to pay any just demand which complainant has against respondent for

telegraphing beyond the terminal points of the road, and respondent further says that the accommodations furnished by respondent to complainant in hauling freight, and transporting its agents and workmen, would justly bring complainant in debt to respondent.

Respondent denies that any of the facts or allegations in complainant's bill are sufficient to require the court to grant the injunction prayed for in complainant's bill. Respondent insists that there can be no right to complainant to recover back money paid for freight and fare, nor to sue for failure to receive and deliver freights at points other than respondent's stations, under a contract which was never binding upon respondent, and which, if it ever was binding, complainant has treated as rescinded; the value of the wire, instruments, batteries, &c., can be clearly ascertained, as appears by complainant's bill for the same as shown in Exhibit D. Respondent further denies that complainant
37 has any right to come into a court of equity in this case to prevent a multiplicity of suits at law. In case the contract has been violated by the State, as complainant treats it as rescinded on that account, complainant would be entitled to recover its full damage, if any, for the entire breach of the contract in a single action against the State. The use of the wire, instruments, batteries, &c., is not necessary to complainant's business, and complainant does not aver that any injury to the property is apprehended, and that respondent would not be able to make good any injury to the same in damages. Respondent is advised that complainant is a foreign corporation, and exists in this State only by comity, and that complainant has no exclusive privileges—no right to object to respondent or any one else owning a telegraphic wire and sending dispatches, either for public or private accommodation—and that complainant has not even the right to occupy any portion of the right of way which has been leased to respondent, as aforesaid. The use of the wire, instruments, batteries, &c., is absolutely necessary to
38 the safe and successful running of respondent's road; without them collisions would be likely to occur between trains, and the lives of travelers, as well as the property of respondent, would be greatly damaged.

And having fully answered, respondent prays hence to be dismissed with his reasonable costs in this behalf most unreasonably expended.

B. H. HILL & SON,
POPE & BROWN,
Respondent's Sol's.

39 EXHIBIT A.

Deed of lease and act of incorporation, by the governor, of the Western and Atlantic Railroad Company, composed of the parties mentioned therein.

Know all these men by these presents, that the following-named persons have been accepted by the governor of Georgia as the lessees of the Western and Atlantic Railroad, under an act of the general assembly of said State, approved October 24, A. D. 1870, and as such lessees have, by the order of the governor of said State, dated the 27th day of December, A. D. 1870, duly and properly entered upon the minutes of the executive department, and by virtue of the provisions of the act aforesaid, become a body corporate and politic, under the name and style of the "Western and Atlantic Railroad Company," to wit: John P. King, of Augusta, Ga.; Joseph E. Brown, of Atlanta, Ga.; Benjamin H. Hill, of Athens, Ga.; William S. Holt, of Macon, Ga.; William B. Johnston, of Macon, Ga.; Andrew J. White, of Macon, Ga.; John T.

Grant, of Walton County, Ga.; William C. Morrill, of Macon, Ga.; Charles A. Nutting, of Macon, Ga.; Simon Cameron, of Harris-
40 burg, Pa.; John S. Delano, of Mount Vernon, Ohio; Wm. T. Walters, of Baltimore, Md.; Thomas A. Scott, of Philadelphia, Pennsylvania; Hannibal J. Kimball, of Atlanta, Georgia; Edmund W. Cole, of Nashville, Tenn.; Richard Peters, of Atlanta, Georgia; George Cook, of New Haven, Connecticut; H. B. Plant, of Augusta, Georgia; Benjamin May, of Columbus, Georgia; Ezekiel Waitzfelder, of New York City; Thomas Allen, of St. Louis, Mo.; and William B. Dinsmore, of New York.

Therefore I, Rufus B. Bullock, governor of the State of Georgia, by virtue of the power and authority vested in me by the aforesaid act of the general assembly of Georgia, do hereby grant, convey, and lease to the Western and Atlantic Railroad Company, composed of the persons whose names are herein given, and to their successors, representatives, heirs, or assigns, the Western and Atlantic Railroad, which is the property of the State of Georgia, together with all its houses, work-shops, depots, rolling-stock, and appurtenances of every character, for the full term of twenty years from this date. To have and to hold the same to
the said company and the individuals composing the same here-
41 inbefore named, and their successors, representatives, assignees, or heirs, amply, freely, and completely, without let or hindrance, until the full expiration of said twenty years, in the following proportions of interest, to wit: Each of said lessees being entitled to one of twenty-three shares, into which the property hereby leased has been divided by their proposition to lease the same, and which proposition was accepted by the governor of Georgia, before the names of said lessees were entered on the minutes of the executive department of said State, except as follows: Joseph E. Brown is entitled to one share and one-half of a share; Hannibal J. Kimball is entitled to one share and one-half of one share; Thomas Allen is entitled only to one-half of one share; Alexander H. Stephens is entitled to only one-half of one share; Simon Cameron is entitled to one share and one-half of one share; and Andrew J. White is entitled only to one-half of one share.

The Western and Atlantic Railroad Company, composed of the persons herein mentioned, who represent the several interests herein described, covenants and agrees for itself, its successors, representatives
and assigns, to pay into the treasury of the State of Georgia, for
42 the use of the State, monthly, and at the end of each month, a rental of twenty-five thousand dollars during the continuance of this lease. Also, to return said road and its appurtenances at the expiration, termination, or forfeiture of this lease, in as good condition as it was in when received by said company from said State under this lease. This lease is given and accepted under all the provisions, grants, and conditions prescribed by the act of the general assembly of Georgia, entitled "An act to authorize the lease of the Western and Atlantic Railroad," and for other purposes therein mentioned, approved October the 24th, A. D. 1870, and hereinafter referred to.

Given under my hand and the great seal of the State, at the capitol in Atlanta, this 27th day of December, in the year of our Lord eighteen hundred and seventy, and of the Independence of the United States of America the ninety-fifth.

[L. S.] RUFUS B. BULLOCK.

By the governor:

DAVID G. COTTING,
Secy. of State.

43 EXHIBIT B.

Copy from inventory.

One single plain wire, No. 9, oiled, 140 miles, 31,396 lbs.; 4,100 insulators & brackets, fastened with three hundred pound spikes, on the Western Union Telegraph Co.'s poles, bet. Atlanta, Ga., & Chattanooga, Tennessee. Value, 5,978.44, connecting the following offices, with full sets of instruments as herein described.

44 Offices.	Registers.	Relays.	Sounders.	Switches.	Keys.	Arrestors.	Off's wire.	Local batteries.	Desks.	Stationery.	Value.
											5,978 44
1. Atlanta	....	1	1	1	1	1	1	1	1	2,000 message-blanks	60 00
2. Marietta	....	1	1	1	1	1	1	1	1	.....	50 00
3. Kennesaw	1	1	....	1	1	1	1	1	1	.....	90 00
4. Cartersville	....	1	1	1	1	1	1	1	1	.....	50 00
5. Kingston	....	1	....	1	1	1	1	1	1	.....	50 00
6. Adairsville	1	1	....	1	1	1	1	1	1	.....	90 00
7. Calhoun	....	1	1	1	1	1	1	1	1	.....	50 00
8. Tilton	1	1	1	1	1	1	1	1	1	.....	100 00
9. Dalton	1	1	....	1	1	1	1	1	1	.....	20 00
10. Ringgold	1	1	....	1	1	1	1	1	1	.....	75 00
11. Chickamauga	1	1	2	1	1	1	1	1	1	.....	90 00
12. Chattanooga	....	1	...	1	1	1	1	1	1	3,000 message-blanks	60 00
	6	12	8	12	12	12	12	12	12		$6,533 44

45 EXHIBIT C.

WESTERN & ATLANTIC RAILROAD CO.,
President's Office, Atlanta, Ga., March 18, 1871.

Hon. WM. ORTON,
Presdt. Western Union Tel. Co., N. Y.

DEAR SIR: Within the last few days my attention has been called to a contract made between you and Foster Blodgett, former superintendent of the W. & A. R. R. of this State, in reference to the road's telegraphic business along your line. The contract purports to have been made by the W. & A. R. R. Co. No such company existed in law or in fact at that time. The W. & A. R. R. was built by the State of Georgia, & was her property. No private person or corporation owned a dollar of stock in the road, & it had never been incorporated by the name of the W. & A. R. R. Co., or by any other name, but was simply the property of the State, & was called the "Western & Atlantic Railroad." Since the date of the contract above referred to, the legislature of the State passed a law authorizing the governor to lease the road to a company to be incorporated for that purpose, to be called the "Western &
46 Atlantic Railroad Company." On the 27th day of December last the company was incorporated accordingly, & the road with all its houses, rolling-stock, & appurtenances of every character was leased to the new company.

Provision is made in the act authorizing the lease for the State to make good any damages & pay any debts that may have accrued to or may be due to any one on account of the road during the time the State has owned, controlled, and managed it, and the new company is not to be cumbered with those matters. It simply pays the monthly rental agreed upon, & has the clear use of the road. In this state of the case, as president of the W. & A. R. R. Co., I feel it my duty to notify you that the company does not hold itself bound by the stipulations of the contract above referred to, as, for instance, that it will, in case of any

other company being chartered along the line, refuse to deliver to that company poles at the points between the depots, or that it will bind itself to deliver poles for you at points other than depots, or the like. In a word, this company does not consider itself a party to that contract.

47 The reason why we are not willing to adopt the contract by which we are not bound, or why we would not make such a contract as that made by Mr. Blodgett is, that we find we would be subject to burdens under it which you do not impose upon connecting roads. One of the stipulations of that contract, as it is now shown to me, is that all messages sent beyond the terminal points of this road, on the business of the road, are to be noted and an account kept, and in case our business exceeds $200 a month, we are to be charged half-price upon the excess. This, I learn, is not the case with the connecting roads at either end, but they have, without any such limit, the right to send all messages necessary in the transaction of their legitimate business. If you will extend to us the same privilege that the other connecting roads enjoy in this respect, we would be willing to enter into a contract with you similar in other respects to that heretofore made by Supt. Blodgett, but, with that provision in the contract, we will not adopt it nor hold ourselves bound by it. We shall, however, claim the right to our wire heretofore paid for by the State, as it is one of the appurtenances of the road, and has been leased to us by the State. We would be pleased to enter into a contract with you similar to the con-

48 tract of connecting roads, if agreeable to you.

I am, very respectfully, your ob't s'v't,

JOSEPH E. BROWN,
President.

49 EXHIBIT D.

Completion of work.—No. of estimate. , 186 .

Construction from Atlanta, Ga., to Chattanooga, Tenn., on Western & Atlantic Railway, 140 miles.

Material used:

Poles @	
4,100 insulators, bracket pattern, @ 18c	738 00
140 miles of No. 9 oiled wire, lbs. @	3,767 50
feet of cable conductor @	
cross-arms, @	
bolts and washers @	
300 lbs. of spikes @ 8c	24 00
nails @	
rings @	
	$4,529 50

Audited by N. P. Hotchkiss, auditor.

Labor and incidental expenses	1,448 94
	$5,978 44
Amount of estimate	$6,000 00
	$21 56

Correct.—J. C. Courtney, supt. telegraph.
Remarks by the genl. supt. Approved:

FOSTER BLODGETT, *Supt.*

Dated , 186 .

GEN'L SUPT. SOUTHERN DIVISION,
50 ATLANTA, GA., *December 1st*, 1870.

The Western & Atlantic Railroad to the Western Union Telegraph Co., Dr.

1870.
DEC. 1.—To registers, relays, keys, switches, arrestors, wire, &c., furnished officers at Adairsville, Ga., Tilton, Ga., and Chickamauga, Tenn., as per bill rendered..... $237 75
Audited for payment.—N. P. Hotchkiss, auditor.
Correct.—J. C. Courtney, supt. telegraph, W. & A. R. R.
Approved:

FOSTER BLODGETT, *Supt.*

51 Received, Atlanta, Jany. 20th, 1871, his excellency the governor, draft upon the State treasurer, dated the 20th Jany., 1871, in my favor for six thousand two hundred and sixteen $\frac{19}{100}$ dollars, it being for a liquidated claim against the Western & Atlantic Railroad, in favor of the Western Union Telegraph Company, and chargeable to 8 sec. act 24th Oct., 1870, to lease W. & A. R. Road.

THE WESTERN UNION TELEGRAPH CO.,
Per C. G. MERIWETHER,
Dist. Supt.

EXECUTIVE DEPARTMENT,
Atlanta, Georgia, Febry. 19, 1872.

I hereby certify that the above is a true copy from the accounts on file in this office.

[L. S.] P. W. ALEXANDER,
Secty. Ex. Dept.

52 UNITED STATES OF AMERICA,
Northern District of Georgia:

You, Joseph E. Brown, as president of the Western and Atlantic Railroad Company, do solemnly swear that the facts contained in the foregoing answer, so far as they concern your own act or deed, are true of your own knowledge, and so far as they concern the acts or deeds of others you believe them to be true.

JOSEPH E. BROWN,
Prest. W. & A. R. R. Co.

Sworn to and subscribed before me this 22nd day of February, 1872.
[L. S. OF COM.] W. B. SMITH,
U. S. Commissioner.

Filed in office this 22nd day of February, 1872.

W. B. SMITH,
Clk.

53 UNITED STATES OF AMERICA,
Northern District of Georgia:

To the judge of the United States district court for the northern district of Georgia.

The Western and Atlantic Railroad Company, a corporation organized under the laws of the State of Georgia, brings this its bill against the Western Union Telegraph Company, a corporation organized under the laws of New York, and thereupon your orator complains and says:

That the Western and Atlantic Railroad Company became incorporated on the twenty-seventh day of December, A. D. eighteen hundred and seventy, that being the day on which your orator became the lessee of the Western and Atlantic Railroad, under the terms of an act approved on the twenty-fourth day of October, eighteen hundred and seventy. By the fourth section of said act it was provided that, upon the acceptance of the proposition of persons seeking to become lessees of the Western and Atlantic Railroad, and the recording of said acceptance as in said section provided, said persons should become a body corporate and
54 politic, for the term of twenty years, under the name and style of the Western and Atlantic Railroad Company; and as such should have power to sue and be sued on all contracts made by said company in any county through which the road runs after the execution of said lease, or for any cause of action which may accrue to said company, or to which it may become liable, after said lease was executed. By the eighth section of said act provision was made for the liquidation and payment of all debts or liabilities of the Western and Atlantic Railroad existing up to the twenty-seventh day of December, A. D. eighteen hundred and seventy, at which time your orator became the lessee of said road and its appurtenances for the full term of twenty years from that date. By said act, and the deed of lease made in pursuance thereof to your orator—a copy of said lease is hereunto attached, marked "Exhibit A"—your orator became entitled to have and to hold, as lessees, the Western and Atlantic Railroad, together with all of its houses, work-shops, depots, rolling-stock, track, right of way, and every other appurtenance of said road, freely and completely, without let or
55 hindrance, for the full term of said lease, and possession of the same was accordingly, on said twenty-seventh day of December, A. D. eighteen hundred and seventy, delivered to your orator. Orator is not bound to perform any contract, make good any default, or answer for any tort of the State of Georgia, or the officers or agents of said road, before said lease was made, but is responsible for its own contracts or torts only.

There was invoiced to your orator, and turned over with said road, as one of the appurtenances thereof, a telegraphic wire running on the right of way of said road from Atlanta, Georgia, to Ghattanooga, Tennessee, together with instruments, batteries, and other fixtures, all of which had been constructed under contract, & had been delivered to and fully paid for by the State of Georgia while said road was under the management and control of said State. Orator became responsible by bond to return to the State of Georgia at the expiration of said lease the said wire with its equipments, as well as the road and all other appurtenances thereof.

56 Upon coming into possession of said road and its appurtenances under said lease, orator found upon the right of way from Atlanta to Chattanooga a line of poles with telegraphic wires and fixtures, all of which were claimed by the defendant, and, with the exception of the one wire already described as leased to your orator, were being used and operated by the defendant for the transmission of despatches for the public. Orator permitted said defendant to keep and use said property on said right of way temporarily, in the hope that some contract might be made between orator and defendant, by which defendant, for a proper consideration, might be permitted to remain on said right of way of said road, and use said property there during the lease; but orator soon discovered that defendant pretended to have a right to remain on said right of way and use said wires, &c., without the permis-

sion of your orator. Defendant claimed to have had a contract with Foster Blodgett, superintendent of the Western and Atlantic Railroad, before said lease to your orator, under which contract it pretends that it has a right to continue on the right of way
57 of said road with its poles and wires, &c., and even went so far as to claim that it had a right to the wire which had been delivered to your orator as an appurtenance to said road under the terms of the lease. Defendant undertook to take said wire out of orator's possession, and when it discovered that it would not be permitted to do that without resistance, it commenced various ex-parte legal proceedings in the State of Tennessee, of which orator had no previous notice, by means whereof orator was wrongfully deprived of the possession and use of a portion of the wire included in the lease above said, and the instruments with which to operate the same, also included in said lease. And your orator further shows that by such illegal seizure and interference the said defendant has rendered your orator unable to keep up telegraphic communication along said road, and at the stations and between the terminal points thereof, as to the movements and running of the trains of your orator on said road, thereby producing constant danger of collisions, destructive to the trains, cars, and engines of your orator, and hazarding greatly the lives of the officers and employees of said company passing upon
58 said trains, and the passengers travelling upon said road, and has compelled your orator to resort to other means much less safe in their character to avoid dangers in conducting its business over that portion of the road lying in the State of Tennessee. And your orator further avers that if said telegraphic communication is not forthwith restored by the order of your honor, your orator apprehends irreparable damage resulting from collision caused by the interruption of said telegraphic communication. And in addition to said ex-parte proceedings in the State of Tennessee, defendant has filed, and has now pending, in this honorable court, on the equity side thereof, a bill denying all right of your orator to use said wire and its equipments, claiming the right to resume possession of the same, and praying for an injunction to restrain your orator entirely from its use and from interfering to prevent defendant from taking entire and exclusive possession and control thereof. Attached to said bill is a copy of a contract which defendant claims to have made with Foster Blodgett, former superintendent of said road, which contract orator submits was ter-
59 minated by the lease aforesaid, and if it was not so terminated, has been entirely broken and rescinded by the defendant, as appears by its actings and doings aforesaid, and by the allegations and prayer of defendant's said bill. Orator avers that defendant had no right to occupy any portion of said right of way except under the contract terminated and rescinded as aforesaid. Orator alleges that defendant has continued temporarily upon the right of way of said road, by sufference only, and now, since orator is unwilling for defendant to remain thereon any longer, defendant is an intruder, and ought to be ejected therefrom. This honorable court having obtained complete jurisdiction of the whole subject-matter by the filing of defendant's bill as aforesaid, your orator prays that until a final hearing said defendant be enjoined from going upon the right of way of your orator, and also from using the wires along said right of way for the purpose of telegraphing, or for any other purpose, and that defendant be further enjoined from interfering with the use of the wire and all its appurtenances, extending from Atlanta to Chattanooga, along said railroad and upon its right of way so purchased and paid for by the State, and so

granted, leased, and delivered by the State of Georgia to your orator. And that defendant be compelled to restore to your orator that portion of the wire, instruments, batteries, and fixtures being within the State of Tennessee, and that on the final hearing defendant be perpetually enjoined, and that defendant be decreed and compelled to pay to your orator such damages for interference with and destruction of the rights of your orator as may seem to your honor to be equitable and just, and that defendant may be declared to be an intruder on said right of way, and may be by decree ejected therefrom, and that such other and further relief may be granted as the nature of the case may require.

Complainant also prays for subpœna.

B. H. HILL & SONS,
POPE & BROWN,
Complts.' Solrs.

EXHIBIT A.

Deed of lease and act of incorporation, by the governor, of the Western & Atlantic Railroad Company, composed of the parties mentioned therein.

Know all men by these presents that the following-named persons have been accepted by the governor of Georgia as the lessees of the Western and Atlantic Railroad, under an act of the general assembly of said State approved October 24, A. D. 1870, and as such lessees have, by the order of the governor of said State dated the 27th day of December, A. D. 1870, duly and properly entered upon the minutes of the executive department, and by virtue of the provisions of the act aforesaid, become a body corporate and politic, under the name and style of the "Western and Atlantic Railroad Company," to wit: John P. King, of Augusta, Ga.; Joseph E. Brown, of Atlanta, Ga.; Benjamin H. Hill, of Athens, Ga.; William S. Holt, of Macon, Ga.; William B. Johnston, of Macon, Ga.; Andrew J. White, of Macon, Ga.; John T. Grant, of Walton County, Ga.; William C. Morrill, of Macon, Ga.; Charles A. Nutting, of Macon, Ga.; Simon Cameron, of Harrisburg, Pa.; John S. Delano, of Mount Vernon, O.; Wm. T. Walters, of Baltimore, Md.; Thomas A. Scott, of Philadelphia, Pennsylvania; Hannibal J. Kimball, of Atlanta, Georgia; Edmund W. Cole, of Nashville, Tennessee; Richard Peters, of Atlanta, Georgia; George Cook, of New Haven, Connecticut; H. B. Plant, of Augusta, Georgia; Benjamin May, of Columbus, Georgia; Ezekiel Waitzfelder, of New York City; Thomas Allen, of St. Louis, Mo.; and William B. Dinsmore, of New York.

Therefore I, Rufus B. Bullock, governor of the State of Georgia, by virtue of the power and authority vested in me by the aforesaid act of the general assembly of Georgia, do hereby grant, convey, and lease to the Western and Atlantic Railroad Company, composed of the persons whose names are herein given, and to their successors, representatives, heirs, or assigns, the Western and Atlantic Railroad, which is the property of the State of Georgia, together with all its houses, workshops, depots, rolling-stock, and appurtenances of every character, for the full term of twenty years from this date, to have and to hold the same to the said company, and the individuals composing the same hereinbefore named, and their successors, representatives, assignees or heirs, amply, freely and completely, without let or hindrance, until the full expiration of said twenty years, in the following proportions of interest, to wit: Each of said lessees being entitled to one of twenty-three shares, into which the property hereby leased has been divided by their proposition to lease the same, and which proposition was accepted by the governor of Georgia before the names of said lessees were entered

on the minutes of the executive department of said State, except as follows: Joseph E. Brown is entitled to one share and one-half a share; Hannibal J. Kimbal is entitled to one share and one-half of one share; Thomas Allen is entitled only to one-half of one share; Alexander H. Stephens is entitled to only one-half of one share; Simon Cameron is entitled to one share and one-half of one share; and Andrew J. White is entitled only to one-half of one share.

The Western and Atlantic Railroad Company, composed of the persons herein mentioned, who represent the several interests herein described, covenants and agrees for itself, its successors, representatives and
64 assignees, to pay into the treasury of the State of Georgia, for the use of the State, monthly, and at the end of each month, a rental of twenty-five thousand dollars during the continuance of this lease.

Also, to return said road and its appurtenances at the expiration, termination, or forfeiture of this lease, in as good condition as it was in when received by said company from said State under this lease. This lease is given and accepted under all the provisions, grants and conditions prescribed by the act of the general assembly of Georgia entitled "An act to authorize the lease of the Western and Atlantic Railroad, and for other purposes therein mentioned," approved October the 24th, A. D. 1870, and hereinafter referred to.

Given under my hand and the great seal of the State, at the capitol, in Atlanta, this twenty-seventh day of December, in the year of our Lord eighteen hundred and seventy, and of the Independence of the United States of America the ninety-fifth.

[L. S.] RUFUS B. BULLOCK.

By the governor:

DAVID G. COTTING,
Sec'y of State.

65 UNITED STATES OF AMERICA,
Northern District of Georgia:

You, Joseph E. Brown, as president of complainant, do solemnly swear that the facts contained in the foregoing bill, so far as they relate to your own act or deed, are true of your own knowledge, and so far as they relate to the acts or deeds of others, you believe them to be true.

JOSEPH E. BROWN,
Pres't W. & A. R. R. Co.

Sworn to and subscribed before me this 22nd Feb'y, 1872.
[COMM'R'S SEAL.]

W. B. SMITH,
U. S. Commissioner.

Filed in office this 22nd day of February, 1872.

W. B. SMITH,
Clk.

UNITED STATES OF AMERICA,
Northern District of Georgia:

THE WESTERN AND ATLANTIC RAILROAD COMPANY, complainant,
and
THE WESTERN UNION TELEGRAPH COMPANY, defendant.
} In equity.

66 The President of the United States to the Western Union Telegraph Company:

For certain causes offered before the judge of the district court of the

United States for the northern district of Georgia, in equity, you are hereby commanded and strictly enjoined that, laying all other matters aside, and notwithstanding any other excuse, your personally be and appear at the clerk's office of the said court in the city of Atlanta, at rules to be had on the first Monday in April next, to answer to those things which shall then and there be objected to you, and to do further and receive what the said court shall have considered in this behalf; and this you may in no wise omit, under penalty of five hundred dollars, and have here this writ.

Witness the honorable John Erskine, judge of the district court of the United States for said district, this 22nd day of February, in the year of our Lord one thousand eight hundred and seventy-two.

[L. S. OF THE COURT.]

W. B. SMITH, *Clerk.*

67 MEM.—Defendant must enter its appearance in this suit to the clerk's office at Atlanta on or before the first Monday in April next, or the bill will be taken pro confesso.

Service acknowledged. Copy and all further service waived, this 23rd Febr'y, 1872.

Western Union Telegraph Company,

By L. E. BLECKLEY,
Attorney.

WESTERN UNION TELEGRAPH CO.
vs.
THE WESTERN & ATLANTIC R. R'D CO. } In equity.

By consent of counsel, it is ordered that the answer of defendant be considered as regularly filed, and that the cross-bill filed by defendant against complainant be taken as filed by leave of court, subject to all defences on the merits of said cross-bill, no objection to said cross-bill being waived by such consent.

JOHN ERSKINE,
Judge.

68 THE WESTERN UNION TELEGRAPH Company
vs.
THE WESTERN & ATLANTIC RAILROAD Company. } In equity.

The motion for an injunction in this cause came on to be heard before me at chambers, and was argued by counsel. I am of the opinion, in the absence of proofs to overcome defendant's answer and the affidavits of Courtney, that the wire and equipments in question are the property of the State of Georgia, & as such are included in the lease executed by the said State to the defendant. And further, that the contract made between the superintendent of the Western & Atlantic Railroad & the complainant, prior to the making of the lease to defendant, is not binding upon defendant, unless adopted by defendant, and as defendant has denied that it has adopted or acted upon the contract set forth by complainant, it is therefore my opinion that the injunction ought to be denied, and it is so ordered.

JOHN ERSKINE,
U. S. Judge.

ATLANTA, GA., *March 11th*, 1872.

Filed March 13th, 1872.

W. B. SMITH, *Clk.*

69 In the United States district court for the northern district of Georgia.

THE WESTERN UNION TELEGRAPH COMPANY *vs.* THE WESTERN & ATLANTIC RAILROAD COMPANY. } Bill for injunction, &c.

This repliant, for replication to the answer of said defendant, saith that he doth and will aver, maintain, and prove his said bill to be true, certain, and sufficient, and that the answer of said defendant is uncertain, evasive, and insufficient; all which this repliant is ready to maintain and prove, and humbly prays as in and by his said bill he hath already prayed, &c.

L. E. BLECKLEY,
Compl't's Sol.

Filed April 1st, 1872.

W. B. SMITH,
Clerk.

70 In the circuit court of the U. States for the northern district of Georgia.

THE WESTERN UNION TELEGRAPH COMPANY *vs.* THE WESTERN & ATLANTIC RAILROAD COMPANY. } In equity.

The complainant demurs to the cross-bill filed by defendant, and for cause of demurrer showeth that said cross-bill is useless and unnecessary for defence to the original bill, and calls for no appropriate relief touching the matters of said original bill, but introduces new and distinct matters which cannot properly be examined at the hearing of the first suit.

Wherefore, and for divers other causes of demurrer, the complainant prays judgment whether he is bound to make any other or further answer to said cross-bill, &c.

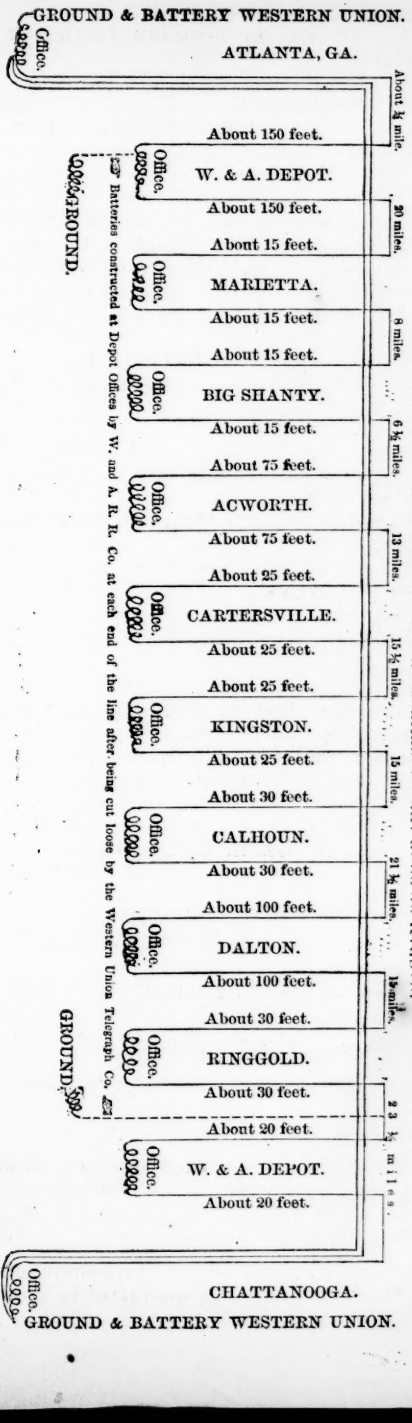
L. E. BLECKLEY,
Compl't's Sol.

Affidavit and all objections as to the time of filing waived, Dec'r 17th, 1872.

B. H. HILL & SONS,
POPE & BROWN,
Respondent's Sol'rs.

71 WESTERN UNION TELEGRAPH COMPANY, complainant, *vs.* THE WESTERN & ATLANTIC RAILROAD COMPANY, respondent. } Demurrer to cross-bill.

The demurrer of the complainant to the cross-bill of the respondent being argued, it is the opinion of the court that the demurrer is good.



Therefore, it is decreed and ordered that the said cross-bill be dismissed, and that the costs abide the further order of the court.

JOHN ERSKINE,
Judge.

DECEMBER 23rd, 1872.

Filed Dec. 23rd, 1872.
W. B. SMITH,
Clerk.

WESTERN UNION Telegraph Company
vs.
WESTERN & ATLANTIC Railroad Company.
} In equity.

By consent of counsel, the above-entitled cause is set down for hearing on the 24th of
72 December, instant, at 10 o'clock a. m., upon the bill, answer, affidavits, and agreed facts, as said affidavits and facts appear in the written agreement of counsel, to be filed before the hearing.

J. ERSKINE,
Judge.

DEC. 23*rd*, 1872.

Filed Dec. 23rd, 1872.
W. B. SMITH,
Clerk.

73 The above diagram shows the situation of the "Telegraph circuit, of the railroad wire on Western and Atlantic Railroad on the 14th of February, 1872. We here show the length of wire between stations, (in miles,) and also the relative length of loops to each office, (in feet.) The loops are now, and have always been, part and parcel of the main circuit.

Before litigation was commenced and immediately after Gov. Brown was notified that prepayment would be required

on all Western and Atlantic Railroad messages over the Western Union lines, the batteries in Atlanta and Chattanooga were withdrawn from the railroad wire. (The battery at Chattanooga some days after Atlanta.) This necessitated the construction of a battery in the W. & A. depots at each end of the wire. The wire, however, has not been removed from the poles, nor from any of the offices mentioned above, except at Chattanooga, Tenn., where the Western Union Company removed everything connected with their office, which was then located in the W. & A. depot building.

About the time of removal of batteries, &c., from Chattanooga and Atlanta, the Western Union Co. also removed from the W. & A. offices at Kingston and Dalton every wire, except the R. R. wire, which was allowed to remain "statue quo" from Atlanta through to Chattanooga, except as above stated.

J. C. COURTNEY,
Supt. Telegraph W. & A. R. R. Co.

74 This diagram is agreed upon as evidence for both parties. The red line shows the wire set apart to the railroad under the contract with the State set forth in exhibit to the bill; the black lines represent two other wires which are owned by the complainant. All three wires are on the same poles, which were erected or purchased by the complainant in or about the year 1866. All of said poles stand on the land owned by the State of Georgia and appropriated to right of way for the railroad. The poles do not interfere in any manner with the use or working of the road for transportation purposes.

It is agreed by counsel that if the use of the wire by the defendant is affected by the contract entered into between the complainant and the State (which contract is copied in the exhibit to the bill) in such manner as that the terms of said contract must be observed and complied with by defendant in order to retain the right to such use, the case is one proper for reference to the master to take an account, unless the court should adjudge that there is no right in complainant to relief in equity.

POPE & BROWN,
Def't's Sol'rs.
L. E. BLECKLEY,
Compl't's Sol.

75 Filed and read this Dec'r 24th, 1872.

W. B. SMITH, *Clerk.*

[Junction of W. & A. R. R., E. Y. Va. & Ga. R. R., S. R. & D. R. R.' Western & Atlantic Railroad Company. Office of Dalton Agency' Geo. C. Connor, agent.]

DALTON, GA., *Feb'ry 9th*, 1872.

J. H. PRESLEY, Esq'r,
Ag't W. U. Tel. Co.:

DEAR SIR: I am informed by the president of this company that the State of Georgia delivered to this company the wire in this office claimed by us. This wire was purchased by the State of your company, & paid for it out of its funds, & delivered our company possession of it as a part of the fixtures of the W. & A. R. R. As this wire is the property of the W. & A. R. R. Co., and as you propose cutting the same out of the office of this company, in its depot, I hereby give you official notice that I, as

agent of the W. & A. R. R. Co., will resist that act with the necessary force to protect the said wire and maintain this company in its rights with reference to said wire.

76 I trust, sir, you will not compel me to take these steps.

Yours truly,

GEO. C. CONNOR, *Ag't.*

This letter is introduced as evidence by the complainant. Let it be considered.

L. E. BLECKLEY,
Compl't's Sol.
POPE & BROWN,
Def't's Sol.

Filed and read this Dec'r 24th, 1872.

W. B. SMITH, *Clerk.*

THE WESTERN UNION TELEGRAPH CO. *vs.* WESTERN & ATLANTIC R. R. Co. } In equity.

This cause came on to be heard at this term, and was argued by coun, sel; and thereupon, upon consideration thereof, it was ordered, adjudged and decreed as follows:

1st. That complainant's bill be dismissed.

2nd. That complainant pay the cost accruing in the original bill, and that defendant pay the costs of the cross-bill.

JOHN ERSKINE,
U. S. Judge.

In open court, Dec'r 24th, 1872.

Filed Dec'r 24th, 1872.

W. B. SMITH, *Clerk.*

77 THE WESTERN UNION TELEGRAPH COMPANY *vs.* THE WESTERN & ATLANTIC RAILROAD COMPANY. } Bill for injunction and relief.

On this tenth day of January, 1873, comes the complainant in open court, by its solicitor, and prays an appeal to the Supreme Court of the United States from the decree of this court disposing of the original bill.

L. E. BLECKLEY,
Complt.'s Solicitor.

Notice of this application acknowledged January 10th, 1873.

JULIUS L. BROWN,
Respondent's Solicitor.

The appeal prayed for above is hereby granted in open court, conditioned that the complainant, within three months, enter into bond in the sum of five hundred dollars, with security to be approved by the clerk.

JOHN ERSKINE,
U. S. Judge.

JANUARY 10th, 1873.

Filed January 10th, 1873.

W. B. SMITH, *Clk.*

78 THE WESTERN & ATLANTIC RAILROAD Company *vs.* THE WESTERN UNION TELEGRAPH COMPANY. } Cross-bill for injunction, &c.

On this tenth day of January, 1873, comes the complainant in open court by its solicitor, and prays and appeal to the Supreme Court of the United States from the decree of this court disposing of the cross-bill.

JULIUS L. BROWN,
Complt.'s Solicitor.

Notice of this application acknowledged January 10th, 1873.

L. E. BLECKLEY,
Deft.'s Sol.

The appeal prayed for above is hereby granted in open court, conditioned that the complainant, within three months, enter into bond in the sum of five hundred dollars, with security to be approved by the clerk.

JOHN ERSKINE,
U. S. Judge.

JANUARY 10*th*, 1873.

Filed Jan. 10th, 1873.

W. B. SMITH, *Clerk.*

79 Circuit court of the United States, northern district of Georgia.

THE WESTERN UNION TELEGRAPH COMPANY *vs.* THE WESTERN AND ATLANTIC RAILROAD COMPANY. } Bill for injunction and relief.

Know all men by these prosents that we, the Western Union Telegraph Company, and James M. Ball, security, are held and firmly bound unto the Western and Atlantic Railroad Company above named, in the sum of five hundred dollars, for the payment of which we bind ourselves, our successors, heirs, administrators, and assigns, jointly and severally, firmly by these presents, sealed with our seals, and dated this 8th day of March, 1873.

The condition of the above is such that whereas the above-named Western Union Telegraph Company have prosecuted an appeal to the Supreme Court of the United States to reverse the decree rendered on the original bill in the above cause:

80 Now, if the said appellant shall prosecute said appeal to effect and answer all damages and costs if the said appellant fail to make the appeal good, then this obligation to be void; otherwise to remain in full force and effect.

THE WESTERN UNION TELEGRAPH COMPANY, [SEAL.]
By their agent J. HERRICK. [SEAL.]
JAMES M. BALL, *Security.* [SEAL.]

Signed, sealed, taken, and approved this 8th day of March, 1873.

W. B. SMITH,
Clerk U. S. Circuit Court.

81 Circuit court of the United States, northern district of Georgia.

THE WESTERN & ATLANTIC RAILROAD CO.
versus
THE WESTERN UNION TELEGRAPH CO. } Cross-bill, &c.

Know all men by these presents that we, the Western & Atlantic Railroad Company, above-named, as principal, and W. C. Morrill, as security, are held and bound unto the Western Union Telegraph Company, above named, in the sum of five hundred dollars, for the payment of which we bind ourselves, successors, heirs, administrators, and assigns, jointly and severally, firmly by these presents. Sealed with our seals, and dated this day of March, 1873.

The condition of the above bond is such that whereas the above-named Western & Atlantic Railroad Company have prosecuted an appeal to the Supreme Court of the United States to reverse the decree rendered on the cross-bill in the above cause:

Now, if the said appellant shall prosecute said appeal to effect,
82 and answer all damages and costs if the appellant fail to make the appeal good, then this obligation to be void, otherwise to remain in full force and effect.

THE WESTERN & ATLANTIC R. R. COMPANY,
By JOSEPH E. BROWN, *President.* [L. S.]
W. C. MORRILL, *Sec'y.* [L. S.]

Signed, sealed, taken, and approved this 8th day of March, 1873.

W. B. SMITH,
Clerk.

83 NORTHERN DISTRICT OF GEORGIA, *ss:*

I, A. E. Buck, clerk of the circuit court of the United States for the northern district of Georgia, do hereby certify the foregoing to be a full, true, and complete transcript of the pleadings, evidence, orders, decrees, and all the proceedings of whatever kind, and of the entire record, in the cause lately heard in said court in equity, wherein, by original bill, the Western Union Telegraph Company was complainant, and the Western & Atlantic Railroad Company defendant, including, also, the cross-bill filed by said defendant, and all acts and proceedings thereon.

In witness whereof I have hereunto set my hand and affixed the seal of said court, at office in Atlanta, this 11th day of October, A. D. 1873.

[SEAL.]

A. E. BUCK,
Clk. Circuit Court.

84 We have examined the foregoing transcript, and agree that the same is complete both as to the case on the original bill and the case on the cross-bill, and we consent that the said transcript be filed in the Supreme Court for use in both appeals.

October 11th, 1873.

L. E. BLECKLEY,
Complt.'s Sol.
JULIUS L. BROWN,
Respondent's Sol.

(Indorsement on cover:) No. 273. N. Georgia, C. C. U. S. The Western Union Telegraph Company, appellant, vs. The Western and Atlantic Railroad Company. Filed 17th October, 1873.

Supreme Court United States.

OCTOBER TERM, 1875.

The Western Union Telegraph Company,
APPELLANT.

vs.

The Western and Atlantic Railroad Company,
APPELLEE.

} No. 61.

Appeals from the Circuit Court of the United States for the Northern District of Georgia.

BRIEF OF THE WESTERN UNION TELEGRAPH COMPANY.

J. HUBLEY ASHTON,
GROSVENOR PORTER LOWREY,
Of Counsel.

M'GILL & WITHEROW, PRINTERS, WASHINGTON, D. C.

Supreme Court of the United States.

OCTOBER TERM, 1875.

THE WESTERN UNION TELEGRAPH COMPANY, Appellant,

vs.

THE WESTERN AND ATLANTIC RAILROAD COMPANY, Appellee.

No. 61.

Appeals from the Circuit Court of the United States for the Northern District of Georgia.

BRIEF OF THE WESTERN UNION TELEGRAPH COMPANY.

STATEMENT OF THE CASE.

The principal case is an appeal from a decree of the Circuit Court of the United States for the Northern District of Georgia, dismissing a bill exhibited by the Western Union Telegraph Company, appellant, against the Western and Atlantic Railroad Company, appellee, in the District Court of the United States for that district, having Circuit Court powers under the act of August 11, 1848. (9 Stats., 280.)

The record also contains an appeal by the Western and Atlantic Railroad Company from a decree of the court below, dismissing a cross-bill filed by that Company against the Western Union Telegraph Company.

The proceedings were pending in the District Court at the date of the act of June 4, 1872, creating a Circuit Court in that district. (17 Stats., 218.)

The Western Union Telegraph Company, organized under the laws of New York, and doing a general telegraph business throughout the United States, and, among others, in the State of Georgia, was, in August, 1870, the owner of a line of telegraph established on the Western and Atlantic Railroad, a railroad owned and operated by the State of Georgia, and extending from Atlanta in that State to Chattanooga in the State of Tennessee.

This line of telegraph consisted of one line of poles sustaining *two* wires, which were erected or purchased by the Western Union Telegraph Company in the year 1866. (Rec., p. 24, fol. 74.)

These wires were not connected with all of the railroad stations on the line of the road from Atlanta to Chattanooga. It became necessary, therefore, with a view to the safe running of the road, that some arrangement should be made by the State of Georgia to remedy the deficiency; and a contract was accordingly entered into for that purpose between the State and the Western Union Telegraph Company.

This contract, which was in writing under seal, was dated the 18th of August, 1870, and was executed on behalf of the State by the Superintendent of the Western and Atlantic Railroad, and approved by the Governor of the State. (Rec., pp. 6, 8.)

The Western Union Telegraph Company agreed, in consideration of certain things to be done for its benefit on the part of the State, as owner and manager of this railroad, to furnish the State certain telegraph facilities, and to give the State certain telegraph privileges, in connection with its line of telegraph; and, among others, to allow the State to have the exclusive use of a wire to be set apart by the Company on its line of poles and connected with the several railroad stations, *for the transmission, under certain conditions, of messages on the business of the railroad on and along its line.*

Under this contract the Western Union Telegraph Company provided a *third* wire, and erected it on its line of poles along the railroad, with the necessary brackets and insulators, and connected it with full sets of instruments in each of the twelve stations on the railroad. (Rec., p. 14, fol. 44; p. 23, fol. 73.)

The wire extended, like the *other* wires of the Telegraph Company, on its poles from Atlanta to Chattanooga, and was more than 138 miles long, and at each end was connected with a battery in the Telegraph Company's office. (Rec., pp. 23, 24.)

On the 27th of December, 1870, the State of Georgia executed to certain persons, incorporated as the Western and Atlantic Railroad Company, a lease of the railroad, "together with all its houses, work-shops, depots, rolling stock, and appurtenances of every character, for the full term of twenty-one years." (Rec., pp. 12, 13.)

The wire in question was included in an inventory of the road and appurtenances, and described as "one single plain wire, No. 9, oiled, 140 miles, 31,396 lbs., fastened with three hundred pound spikes on the Western Union Telegraph Company's poles between Atlanta, Georgia, and Chattanooga, Tennessee, value $5,978 44." (Rec., p. 14, fol. 43.)

Possession of the demised premises was delivered to the lessees on the day of the execution of the lease.

On the 20th of January, 1871, more than three weeks after the Western and Atlantic Railroad Company entered under their lease, the State, in pursuance of the sixth covenant of its contract of August 18, 1870, with the Western Union Telegraph Company, paid that Company the cost of constructing the wire and its equipments, being $6,216 19. (Rec., p. 16, fol. 51.)

On the 18th of March, 1871, the President of the West-

ern and Atlantic Railroad Company, professing to have then for the first time acquired knowledge of the provisions of the contract of August 18, 1870, addressed a letter to the President of the Western Union Telegraph Company, stating that while his company would not be bound in any way by that contract, it would claim and use the wire in question as an appurtenance of the railroad. (Rec., pp. 14, 15.)

The Western Union Telegraph Company continued to perform the contract on its part after the date of the lease, and by the 1st of September, 1871, it had transmitted messages for the Railroad Company to and from points beyond the line of its road to the amount of $300, if charged at half rates, and with the monthly deductions of $200, provided in the contract. (Rec., p. 3, fol. 8.)

Repeated demands having been made upon the Railroad Company for the payment of this amount without avail, and it being apparent that the Railroad Company would not abide by any of the terms of the contract, and wholly repudiated and disavowed it, the Western Union Telegraph Company, refused to continue such service, except on receipt of the regular rates. (Rec., p. 3, fol. 8.)

Thereupon the Railroad Company issued an order refusing to allow its telegraph agents to transmit any messages for the Western Union Telegraph Company; excluding the Telegraph Company's operators from the depots along the road; compelling the Telegraph Company's agents to pay full rates for transportation of themselves and telegraph supplies; refusing to deliver such supplies at points between regular stations; and *opening to the public the use of the Telegraph Company's wire, erected in pursuance of its contract with the State of August*, 1870, *both for the extreme points of Atlanta and Chattanooga, and the intermediate stations, with directions to collect customary rates for the same, and pay the money into the Railroad Company's treasury.* (Rec., p. 3, fol. 10.)

The Railroad Company having thus carried into effect its purpose to use and enjoy the wire as if it were its own

property, and disregard the obligations of the contract, the Western Union Telegraph Company, being unable to make any effectual use of the wire without separating it from the Railroad Company's offices, determined, as was its right, to sever its connections with those offices.

On the 9th of February, 1872, the Railroad Company gave notice to the agent of the Western Union Telegraph Company that an attempt to sever the wire from the railroad depots or offices would be resisted with force. (Rec., p. 4, fol. 13; p. 24, fol. 75.)

On the 14th of February, 1872, the Western Union Telegraph Company filed this bill, praying for an injunction restraining the Railroad Company: 1st, from using the wire for any purpose whatever, and from receiving the earnings thereof; 2d, from hindering, obstructing, or molesting the Telegraph Company in the use thereof, or in severing it from each and all the offices or depots of the Railroad Company with which it is connected. (Rec., p. 5, fol. 17.)

The bill also prayed for such *other* and *further* relief as the nature of the case should require. (Rec., p 6, fol. 17.)

The *answer* of the Railroad Company admitted the execution of the contract of August 18, 1870; that orders were issued on the part of respondent and complainant substantially as averred in the bill; and that any effort on the part of the Western Union Telegraph Company to take possession of the wire, instruments, batteries, &c., without due process of law, would be resisted by the Railroad Company with force. (Rec., p. 11, fol. 34.)

The answer averred that the Railroad Company was not a party to the contract; that it had never agreed to its terms or in anywise accepted the same, and could not be bound by them; that notice had been given by it to the Telegraph Company on March 18, 1871, that it was not a party to, and would not perform the contract; and that it had done no act that was intended to be, or could be con-

sidered, an acceptance of the contract or any of its terms. (Rec., pp. 9, 10.)

The answer further set up that the wire, &c., were the absolute property of the State, and that the Railroad Company was entitled to use the same as all other property of the road, without any reference to any contract the State might have previously made with parties for the purchase or use of the same. (Rec., p. 10, fol. 30; p. 11, fol. 34.)

The Western Union Telegraph Company filed a general replication, and the case was heard on bill, answer, and an agreed statement of facts. (Rec., pp. 23, 24.)

It appears that the wire in question, some 138 miles long between the stations, is suspended upon and upheld by the poles of the Western Union Telegraph Company, which were purchased or erected by that company in 1866, and is connected with ten stations of the Railroad Company, as shown in the diagram. (Rec., p. 23.)

The Western Union Telegraph Company can make no effectual use of the wire without separating it from the railroad offices. (Rec., p. 5, fol. 14.)

When first erected, the wire was connected, at one end, with a battery in the office of the Telegraph Company, at Atlanta, and at the other, with a battery in its office at Chattanooga, which was then located in the railroad depot building.

When this controversy began, the batteries in Atlanta and Chattanooga were withdrawn from the wire, which necessitated the construction of a battery in the depot of the Railroad Company at each end of the line.

The Railroad Company is operating this line of wire on the poles of the Western Union Telegraph Company, as if it were its own property, not only for the purposes of its proper business on and along the line of the road, but also for the transmission of messages for the public, and is ap-

propriating the income and profit of the telegraph business done on this wire to its own use.

The *cross-bill* of the Western and Atlantic Railroad Company asked an injunction restraining the Western Union Telegraph Company, (1) from going upon the right of way of the Railroad Company, and using the wires along that right of way for the purpose of telegraphing, or for any other purpose; (2) from interfering with the use of the wire from Atlanta to Chattanooga; and for a mandatory injunction compelling the Telegraph Company to restore the portion of the wire, &c., being within the State of Tennessee; and for a further decree compelling it to pay damages for interfering with the rights of the Railroad Company, and ejecting the Telegraph Company from the right of way of the Railroad Company. (See the cross-bill, Rec., pp. 16–19.)

The Western Union Telegraph Company demurred to this cross-bill. (Rec., p. 22, fol. 70.)

The Circuit Court entered decrees dismissing the bill, (Rec., p. 25,) and dismissing the cross-bill. (*Ib.*, p. 22, fol. 71.)

Assignment of Errors.

The Circuit Court erred:

1. In dismissing the bill of the Western Union Telegraph Company.

2. In adjudging that the telegraph wire and equipments in question are the absolute property of the State of Georgia, under the contract of August 18, 1870, with the Western Union Telegraph Company.

3. In adjudging that that the wire and equipments in question passed by the lease of December 27, 1870, to the Western and Atlantic Railroad Company.

4. In deciding that the Railroad Company was entitled, under its lease, to enjoy the use of the wire and equipments for the purpose of transmitting railroad messages along the line of the road, without being bound by any of the covenants entered into by the State with the Telegraph Company in the contract of August 18, 1870.

5. In deciding that the use of the property by the Railroad Company was not affected by that contract, and that the Company was not restricted, in the use of the property, to the transmission of legitimate railroad messages on and along the line of the road, and that it might also use it in the business of general telegraphing for the public.

6. In adjudging that the contract of August 18, 1870, was not binding, in any manner, upon the Western and Atlantic Company unless adopted by it; and that the Company had not adopted the said contract.

7. In adjudging that the Western Union Telegraph Company is not entitled to the relief specially prayed for, or to any other relief under the prayer of general relief.

Argument.

First.

The Western Union Telegraph Company did not sell, or agree to sell, these 138 miles of telegraph wire and equipments to the State of Georgia.

I. The principal question for the determination of the court in this case arises upon the construction of the covenants of the contract of the 18th of August, 1870, between the Western Union Telegraph Company and the State of Georgia.

The theory of the Railroad Company, which found acceptance in the court below, appears to be that the Telegraph Company covenanted in that contract to *sell* the wire which was to be erected upon its poles, and that the *general and absolute* property therein was thereby transferred to the State. And if this proposition is not correct, it appears to be conceded by the Railroad Company, that it has no case on the merits of the controversy.

This proposition is not only controverted by the Western Union Telegraph Company, but it is deemed to be without a shadow of just foundation in the actual agreement of the parties, and directly repugnant to the express words of that instrument.

It is utterly denied that the construction attempted to be placed upon the contract of the 18th of August, 1870, on the part of this Railroad Company, is or can be the true construction of it; and it is confidently submitted, that the court will be unable to find either upon the face of the contract or in the surrounding circumstances, or in the pre-existing relations of the parties, a scintilla of evidence tending to show that it was ever intended by the parties that the general property in the wire should be transferred to the State of Georgia.

We think the court, when it comes to read the contract,

will see clearly that, so far from the parties having expressed an intention to pass the absolute property in the wire, the instrument they executed contains *not one word* which can fairly or reasonably be supposed to have been inserted for the purpose, or with the idea of expressing an undertaking of that nature or to that effect.

The Western Union Telegraph Company never meant to constitute the State or any corporation the owner of this property; nor could the authorities of the State, when they signed the instrument, have supposed they were purchasing it, or acquiring the title to it.

Both parties manifestly understood that the wire would continue to remain in the ownership of the Western Union; and they could have had no thought that the effect of what they were doing would be to change the title of the property.

What they bargained about was solely the right to use the wire and its equipments for the purpose mentioned in the instrument, subject to all the terms, conditions, and obligations therein expressed.

The subject-matter of their agreement was not the property in the wire—not at all; but simply the qualified use of the wire, nothing more.

The words of that agreement, it will be seen, are expressly and pointedly limited, not only to the privilege or right of *using* the wire, but to a very *restricted* exercise of that right, for a particular purpose *carefully defined in the instrument*.

By no process of construction could such an agreement be made to stand for and operate as a bargain and sale of the property in the wire. And it is respectfully submitted that this could only be done by *making* for the parties an agreement which, we conceive, they had never a thought of entering into.

It will be observed, upon the most superficial examination of the contract, that the stipulations on each side are carefully expressed in very full detail, and that the covenants

of each party are contained in a separate portion of the instrument; and the design of the covenanting parties plainly was to express, in clear and unmistakable language, what they intended to stipulate for; and yet there is no word in any of the covenants of the Western Union Telegraph Company, which express the semblance of an intention to part with the *title* of this property. Surely into an instrument of this character, thus conceived and drawn, such a covenant cannot be interpolated by implication.

II. Such being the view of this contract entertained by our Company, we proceed to demonstrate its correctness by an analysis of the terms of the instrument. (Rec. pp. 6–9.)

1. The scheme and objects of the contract are clearly set forth in the recital. (Rec., fol. 19.)

They are stated to be, "*to provide necessary telegraph facilities*" for the State, as proprietor and manager of this railroad; to settle the terms on which the Western Union Telegraph Company should occupy the railroad "with the line or lines of telegraph *wires* BELONGING TO" that Company; and to define the business relations between the State and the Company.

Clearly there is no intimation here that the parties contemplated "a bargain and sale" of a telegraph wire, or any telegraph property.

2. Following this recital, is a group of *six* covenants on the part of the Western Union Telegraph Company, intended to express each and everything meant to be granted or done by that Company; and afterwards a group of *six* covenants on the part of the State, which express the obligations assumed by the State, and constituting the consideration for the covenants of the Telegraph Company.

It will be important to observe, at the outset, that no particular covenant of the State was intended to be the special consideration for any one of the covenants of the Company, but that *all* of the six covenants of the former, *as an entirety*,

were the contemplated consideration for all that was agreed to be done by the latter.

The consideration on each side is an *entirety*.

The covenant of the State, for example, to pay the "cost" of constructing this telegraph wire, was in no sense the special consideration of those covenants of the Company, which relate to the use of the wire by the State.

The amount of money stipulated to be paid by the State, measured by the cost of constructing the wire, was to be paid in part consideration for *all* the things covenanted to be performed by the Telegraph Company for the benefit and advantage of the State.

It would be a false and fallacious construction of this contract to consider the *sixth* covenant of the State the consideration for the first *four* covenants of the Telegraph Company, or any one of them. That sixth covenant, by the true construction of the contract, is as much the consideration of the *fifth* and *sixth* covenants on the part of the Telegraph Company as of the first four covenants of that Company, or any one of them.

The covenants which the parties themselves have by their contract made entire, cannot by construction be torn asunder.

3. The Western Union Telegraph Company, then, in consideration of the six stipulations on the part of the State, agreed:

1st. To set apart on its line of poles, along the railroad, a telegraph wire for the exclusive use of the State.

2d. To equip this line of wire with as many instruments, batteries, etc., as the State might require for use in its railroad stations, and to put the same in working order.

3d. To run this wire into all the offices of the *Telegraph Company* along the railroad.

4th. To have this wire set apart for the exclusive use of the railroad, *in the transmission of messages on the business of the railroad* ON AND ALONG THE LINE THEREOF; and it was agreed that all such messages originating on the road, whether sent from or received at the stations on the road of the Telegraph Company or of the State, should be sent and delivered free of charge.

5th. To transmit free of charge, "over *other* wires of said Telegraph Company," when the wire set apart to the railroad should be out of order, *messages on the business of the railroad between points on the road where the Telegraph Company might have stations*, giving precedence, if possible, to messages relating to the movement of trains over commercial or paid messages.

6th. To furnish the principal officers and agents of the railroad with annual passes entitling them to send messages free "over *all* the lines" of the Telegraph Company, the State paying half rates for all such business done for it by the Telegraph Company over $200 in any one month.

Then follow the *six* (an equal number of) covenants on the part of the State, expressed to be in consideration of the covenants of the Telegraph Company.

By the fourth covenant of the State, the telegraph operators appointed by the State at the railroad stations were made subject to the rules and regulations of the Western Union Telegraph Company. (Rec., p. 7, fol. 23.)

By the *fifth* of these covenants of the State, it will be specially observed, the State agreed to receive for transmission and send over the wires and deliver to address at the railroad telegraph-offices in town or at stations where the Telegraph Company might have no offices, all commer-

cial or other messages that might be offered under the rules of the Company, and pay over monthly to the Company all the tolls collected thereon.

The *wire and equipments in question* were, in other words, to be used by the State at railroad stations where the Telegraph Company might have no offices, *for the benefit of both parties.*

And it was specially agreed, in this fifth covenant of the State, that the regular tolls should accrue to the *Western Union Telegraph Company* on any and all business received at or transmitted from the telegraph stations of the *State*, except the *legitimate railroad messages of the State.* (Rec., p. 8, fol. 24.)

As part of the entirety of consideration for all that was stipulated to be done by the Telegraph Company for the benefit of the State, the latter agreed, *sixthly*, to pay the cost of constructing the wire in question, and equipping the same, as soon as it could be ascertained;—not the *value* of this property as upon a sale to a purchaser, but the bare *cost* of it to the Telegraph Company.

The proposition, then, is, on the part of the Western Union Telegraph Company, that this contract is *not* a contract of "bargain and sale," by which the title of the wire and its equipments was transferred to the State. There is not a clause or a word in it, we think, which expresses or imports an intention to change the title and vest it in the State; while the instrument itself refers to the wire (as we have seen) as *one of the wires of the Telegraph Company.*

We proceed to prove this proposition.

(*a*) It is indisputable that the instrument contains no *expressed* agreement on the part of the Telegraph Company to *sell*, and no *expressed* agreement on the part of the State to *purchase*, any telegraph wire for any *price.*

It is inconceivable that these parties, if they meant to enter

into an agreement for the sale of a telegraph wire, would have forborne to say *expressly* what they intended in the instrument—a very formal and solemn writing under their respective seals.

(*b.*) The agreement of the Western Union Telegraph Company *expressly* is, not to *sell* any telegraph wire, but to "set apart" on its line of poles a telegraph wire for the exclusive use of the State *in the transmission of legitimate railroad messages—that is, messages on the business of the railroad—on and along the line of the road.*

The expressed subject-matter of the contract, therefore, is the right to use a wire set apart by the Company on its line of poles, for a particular purpose—not the transfer of the title or right of property in any wire of the Company, then on, or afterwards to be put on, the telegraph poles.

The agreement assumes that the property in the wire is to remain unchanged throughout the period of the contract, and implies that the contract of the parties was in regard to *nothing* but what they *expressly* mentioned as its subject-matter.

There is nothing in the agreement which would have prevented the Telegraph Company from setting apart either of the two wires then on the poles for this particular service. It was not bound to erect a new or third wire.

All the company was bound to do was to permit the State to *use* one of its wires on this line of poles, in the manner and to the extent specified.

(*c.*) The Western Union Telegraph Company did not agree (as we have seen) that the State should have the exclusive use of the wire, when set apart under the contract, for *all* purposes, *or even for all purposes of telegraphic communication within the limits of the line of the railroad.*

By the express and implied stipulations of the contract

the right of user was specially limited and specifically restricted;

1*st*. *To a use in a particular place—on the poles of the Telegraph Company erected on the road.*

2*d*. *To a use for the purpose of telegraphic communication only.*

3*d*. *To a use for the purpose of telegraphic communication upon a particlar subject and of a particular tenor, viz, the legitimate business of the railroad.*

4*th*. *To a use for the transmission of messages on the legitimate business of the railroad, on and along the line of the road; that is to say, between the extreme points on the railroad and intermediate points, and not to or from any point beyond the line of the road.*

5*th*. *And* (by the fourth agreement on the part of the State) *to a use for the transmission of such messages between those points, when sent by the operators of the railroad, acting under the regulations prescribed by the Telegraph Company.*

And the court will observe, as has been already mentioned, that even *this* use, thus limited as to PLACE, PURPOSE, OBJECT, ORIGIN AND POINTS OF TRANSMISSION, was further restricted by the concurrent conditions, made obligatory upon the State by the terms of the contract, and which constituted in part the consideration of the Telegraph Company for the agreements on its part, one of which was that *the instruments, batteries, office, lines and other fixtures, at railroad stations, where the Telegraph Company had no offices, were to be used by the State for the benefit of both parties.* (Fifth Stipulation, Rec. p. 7, fol. 23.)

By that fifth stipulation of the State, the Western Union expressly reserved a right to have this wire and its equipments employed in the transmission of all commercial and other messages offered at railroad stations where it (the

Western Union) had no offices, and to receive the income of all such business.

The words of the contract of the State explicitly are that "*the regular rates of tolls shall accrue to the party of the first part (the Western Union) on any and all business received at or transmitted from the telegraph stations of the party of the second part, (the State,) except the legitimate railroad messages of said party of the second part.*"

And, further, by the *fourth* and *fifth* stipulations on the part of the State, the operators appointed by the State at its stations on the road, both when engaged in operating the line of wire for railroad purposes and when engaged in serving the Telegraph Company, were to be subject to the rules and regulations prescribed by that Company. (Rec. p. 7, fol. 23.)

It thus clearly appears that the only right granted, or intended to be, by the Telegrayh Company to the State, was the right to use the property under the rules and regulations of the former, for the transmission of messages on and along the line of the railroad, on the legitimate railroad business of the State.

(*d*) The *terminology* of the instrument in question negatives and refutes all idea that the parties regarded the wire as sold, or intended to be sold, or as belonging to the State at any moment of time.

The fifth covenant on the part of the Telegraph Company (Rec., p. 6, fol. 20) contains these words:

"*When the wire* SET APART *to said Railroad Company shall not be in working order, to transmit free of charge* OVER OTHER WIRES *of said Telegraph Company the messages of the officers and agents of the party of the second part on the business of said Railroad Company, between points on said road where said Telegraph Company may have stations,*" *&c.*

The wire in question is here spoken of *as one* of the wires of the Telegraph Company, and in the contingency referred

to the State is given the right to transmit its railroad messages over "*other wires*" of the Telegraph Company.

Again, the wire, in reference to which the contract was made, is here designated, as it repeatedly and invariably is in the instrument, not as the wire *sold*, or *intended* to be sold, but as "*the wire set apart*" to the State.

So, in the sixth stipulation on the part of the State, the wire is referred to as the wire "designated and set apart" to the use of the State. (Rec., p. 8, fol. 24.)

Thus it appears that the parties, both the parties, unite in speaking of this wire, not only as the wire "set apart" by their contract for the designated use, but also *as a wire of the Telegraph Company.*

When the wire set apart for the particular use designated by the contract shall not be available for the purpose intended, then the State is given a right to have its railroad messages, between points on the road where the Telegraph Company may have stations, transmitted free of charge "*over other wires of said Company.*"

By what terms could the parties have more explicitly declared the railroad wire to be one of the wires of the Telegraph Company?

(*e*) The stipulation of the State to transport, free of charge, wire and other materials for construction and repair, also shows clearly that the property in the railroad wire was to remain in the Telegraph Company. That important stipulation is restricted in terms to the free transportation of such material, when necessary for the construction and repair of the *lines of the Telegraph Company.* (Rec., p. 7, fol. 22.) The material needed for the construction and repair of the *railroad wire* was, of course, included in that stipulation. Necessarily, therefore, the parties regarded that wire as one of the wires of the Telegraph Company.

(*f*) Again, it will be observed, the actual possession of

the wire was not changed. Except at the railroad stations, where it had telegraph offices, the State had no actual possession of any part of it. The wire, throughout its length, at the *termini* at Atlanta and Chattanooga, and at the offices of the Telegraph Company along the line of the road, was in the actual possession of the Telegraph Company.

(*g*) The theory that this contract was a bargain and sale of the wire and equipments, may be further shown to be untenable by considering the *consequences* to which it leads.

1st. If the State acquired the title of the property by this transaction, it would have had the right, as owner, to remove it from the telegraph poles, and sell or otherwise dispose of it for its own benefit.

But the contract not only plainly does not contemplate the possibility of the removal of the wire from the polls of the Telegraph Company along the line of the railroad, but expressly, as we have seen, reserves to the Western Union Telegraph Company a distinct interest in it, and the instruments and batteries connected with it, by binding the State to receive and transmit and deliver to address at the railroad stations where the Telegraph Company may have no offices, all *commercial* or other messages that may be offered under the rules of the Telegraph Company, and to pay over monthly to that Company all the tolls collected thereon.

It is absurd to suppose, in the face of such a covenant, that the State believed, when it executed this instrument, that it was acquiring the absolute ownership of the wire, or dreamed it would be susceptible of such a construction as that now attempted to be put upon it.

2d. Again, if the contract was intended to be a contract of sale, the State would have been authorized to use the property in any manner, and for any purpose, and to any extent it saw fit, and transfer that right of user to any

other party, or, at least, it would have contained no limitations upon the use of the property.

But by the terms of this contract the wire is authorized to be used by the State *alone*, and for no purpose except to transmit legitimate railroad messages between the extreme points on the road and intermediate points, and commercial or other messages for the Western Union Telegraph Company at stations where that Company might have no offices.

The limitations and restrictions thus expressly imposed by the contract upon the right to use the property, show that it could not have been the intention of the parties to change the title, and repel the theory of ownership by the State.

3d. Further, it will be observed the contract was intended to secure to the Western Union Telegraph Company, as one of its objects, the exclusive right to carry on the general business of telegraphing for the public along the line of the railroad.

The proposition on the other side, however, is that as soon as the contract was signed, and the wire was set apart under its provisions for the use of the State, the State had a right, as vendee of the property, to open telegraph offices at its railroad stations for the reception, transmission, and delivery of commercial and other messages for pay, and collect and appropriate the tolls thereon to its own use, and thus carry on a general telegraph business all along the line of the road, in competition with the Western Union Telegraph Company.

In other words, the theory is that the State, as soon as it entered into the contract, had a right to repudiate and trample upon all the obligations it had assumed to the Western Union Telegraph Company, and that for this fraud upon the contract no remedy exists, either at law or in equity.

In the view of the appellee, the sole object and intended effect of the contract of the 18th of August, 1870, were to enable the State of Georgia to get the ownership and con-

trol of a line of telegraph which it would be at liberty to use for the purpose of driving our Company from the field of telegraph business along the line of the railroad; and this preposterous theory is gravely maintained in the face of the contract of the parties, which authorizes the wire and equipments appropriated to the use of the State by our Company to be used only for the transmission of legitimate railroad messages, and of the express covenants of the State, which bind it to give no encouragement to the establishment of a competing line along the railroad.

It will be observed, moreover, that this telegraph line which the Railroad Company claims the right to operate for its own profit, consists not only of our wire and equipments, but of our *poles* also, along this route of over a hundred miles, which it has no color of right to use except under the contract it now sets at defiance.

(*h*) The covenant on the part of the State, that it would pay the "cost" of constructing the wire to be designated and set apart to its use by our Company, and its equipments, when the same should be ascertained, cannot, in any just view of the contract, be regarded as the consideration of any of the covenants on the part of our Company in relation to that wire and those equipments, in any other or different sense than that all the six covenants on the part of the State, as an *entirety*, are the consideration of all the six covenants, as an *entirety*, on the part of the Company.

But if it can, the construction will not avail the Railroad, for the "cost" was not, by the express words of the instrument, paid for *title*, but for the grant of a particular and limited use of the property.

The contract contemplated the grant by the Company of certain telegraph rights and privileges to the State, with the view of facilitating its railroad operations, and those rights and privileges are secured to the State by the six specific covenants of the Company, and in consideration of those covenants the State was *to pay the money and perform the*

other things stipulated for in the covenants on its part in the contract; and there is nothing whatever in the words, nature, or form of the contract to indicate that the covenant, in regard to the payment of the cost of the wire and equipments appropriated to the use of the State, had, in the estimation of the parties, any other or different relation to the specific covenants of the Company, in regard to the appropriation of a wire and its equipments to the use of the State, than that occupied by the other covenants on the part of the State.

The money, to an amount equal to the cost of constructing the wire in question, stipulated to be paid by the State, was intended to be as much compensation to the Telegraph Company for the *other* telegraph privileges accorded to, and to be enjoyed by, the State under the *fifth* and *sixth* stipulations of the Company, as for the exclusive use of that wire which the Company agreed to give the State.

We would have no right to suppose, if the construction of the contract now presented were not, as it is, the only proper legal construction of it upon its face, that the Western Union Telegraph Company would make a contract, in the first place, to *sell* a telegraph wire at all, and, in the second place, to sell such a piece of property for "*cost.*"

The Company is not engaged in the business of selling telegraph wire. It purchases or manufactures telegraph wire for use in its proper business. Least of all does it or would it sell such property for its cost, either the cost of its manufacture or the cost of its purchase from a manufacturer of the article.

If the Company meant to sell one of its wires to the State, it would naturally have been careful to stipulate for the payment of its value—what it was worth to the Company, not its cost, which we cannot assume was its value.

By the contract the wire in question was to be erected upon the poles of the Telegraph Company, and run into all the telegraph offices of the Company, as well as into all

the railroad stations of the State, and equipped in those stations with all the fixtures necessary to put it in complete working order.

The right to use the wire, as provided in the contract by the State, thus implied a right to use the telegraph poles and fixtures thereon belonging to the Company. The use of these poles and fixtures was a valuable privilege, and it was part and parcel of the telegraph privileges and facilities meant to be obtained by the State from the Telegraph Company, and for which the State stipulated to pay that Company the "cost" of the wire, and to give it the railroad privileges mentioned in the other stipulations in this contract.

But, according to the claim now set up by the Railroad Company, the Western Union Telegraph Company agreed to give the State a telegraph wire 138 miles long, and the right to enjoy the perpetual use of its poles, for the bare cost of the wire; in other words, to place the State in possession of a complete *line of telegraph* for the simple cost of the wire and equipments, giving it telegraph poles and fixtures without any consideration.

The truth is, as the contract shows, that what is called the "cost" of the wire and equipments was a sum of money measured by that cost, agreed to be paid by the State, in connection with the other privileges granted by the State to the Company, as compensation for all the valuable telegraph rights, privileges, and facilities accorded to the State by the Company, including the use of the wire and equipments for the special purpose designated, the use of the telegraph poles of the Company, the right to have the railroad messages transmitted *free of charge* over the other wires of the Company, when the railroad wire should not be in working order, and the right to have its business transmitted free of charge to a certain amount, and above that amount at half rates, over all the wires of the Telegraph Company beyond the line of the railroad.

There is no warrant, from anything in the contract, for saying that the amount of the cost of the wire and equipments was intended to be paid as consideration for any one of the important and valuable telegraph facilities accorded to the State by the Telegraph Company, any more than for any other.

III. It is clear, we submit, that the title of this property did not pass to the State under the contract; and the State, therefore, had no power to lease it to the Railroad Company.

Second.

It is unnecessary to consider whether the State had a right to assign or lease the contract of the 18th of August, 1870, to the Railroad Company, for it is clear that, according to the Railroad Company's version of the transaction between it and the State, in regard to this wire and its equipments, the action of that Company in respect to the property has been and is wholly and absolutely tortious.

I. That transaction, according to the version of it given in the answer of the Railroad Company, purports to have been an assignment and lease of the general and absolute property in the wire and equipments for the term of twenty-one years, and not an assignment or lease of the *contract* or the State's restricted right of user; and if this was the transaction, there can be no doubt, upon well-settled principles of law, that it was absolutely tortious, and that the use of the property by the Railroad Company has been from the beginning a continuing trespass as against the Western Union Telegraph Company.

II. By the act of October 24, 1870, entitled "An act to authorize the lease of the Western and Atlantic Railroad," the Legislature of Georgia empowered the Governor to lease that railroad, together "with all its houses, workshops, depots, rolling-stock, and *appurtenances* of every

character" for the term of twenty-one years. (Georgia Acts, 1870, p. 55.)

On the 27th of December, 1870, the Governor executed a lease to this Company, granting, conveying, and leasing "the Western and Atlantic Railroad, which is the property of the State of Georgia, together with all its houses, workshops, depots, rolling-stock, and *appurtenances of* every character, for the full term of twenty-one years from that date."

The lease, it will be seen, does not in terms purport to pass or transfer this *contract* of the State with the Western Union Telegraph Company.

The claim of the Railroad Company is that the intention was to pass the *title* of the property in reference to which the contract was made, as a piece of property owned by the State and appurtenant to the railroad.

The answer alleges as follows:

"When the road and its appurtenances were turned over to the respondent by Foster Blodgett, former superintendent, the said Blodgett called the attention of Joseph Brown, president of respondent, to said wire, instruments, batteries, and fixtures, as one of the equipments or appurtenances of said road which belonged to respondent under the terms of the lease, and said Blodgett stated to said Brown that the State of Georgia had purchased and fully paid for the same, and the same was delivered by said Blodgett then and there into the possession of respondent, and from that time henceforth was used by respondent as all other property of said road was, *without any reference to any contract to which the State may have previously made with parties for the purchase or use of the same.* And said wire, &c., were invoiced to respondent by the Commissioners appointed to make out a schedule of said road and its appurtenances," &c.

(Rec. p. 10, fol. 30.)

Subsequently, the answer alleges, the Telegraph Company was notified that the Railroad Company would claim

the right to what it styled "our wire," as one of the appurtenances of the road leased by the State.

And, further, the answer admits the Railroad Company has opened to the public the use of the wire, both for the extreme points and the intermediate stations, and collects and appropriates to its own use the customary rates of toll.

The claim is thus distinctly and expressly made that the Railroad Company took and has been in the profitable use of this property ever since, under a pretended demise of the absolute title for the term of 21 years, and that it has the right to exclude the Telegraph Company from all dominion over it, and from all enjoyment of it, and to use and control it to any extent and for any purpose it pleases, and appropriate its income without any accountability to the Telegraph Company, as in the case of any appurtenance of the road.

III. Now, it is clear that, accepting the construction of the acts of the parties to this lease placed upon them by the railroad corporation, those acts constitute a *tortious taking and use* of this property of the Telegraph Company, for which that Company is entitled to all the redress afforded by the law in such cases.

The case, upon the showing of the appellee, is therefore this: The State of Georgia having a right by special contract with our Company to use its property for a specific purpose, conditioned upon the performance of certain covenants by the State, undertakes to sell or lease that property to a corporation absolutely for a term of years, and its grantee or lessee, repudiating all the obligations, liabilities, and restrictions affecting the use of the property under the contract, receives and uses the property as if it were its own, and excludes our Company (the sole owner) from all dominion over it, thus violating continuously that Company's rights of property, not only in the things themselves, but in the franchises annexed to them.

The case thus presented is that of a continuing trespass, giving the Telegraph Company every day a fresh cause of action, and amounting, in the eye of the law, to destruction of the property, which a Court of Equity will restrain by its process of injunction.

If it be conceded that the right or interest in the State, under the contract of 1870, amounted to a special property in the wire and equipments, (as it did not, for there can be no special property without possession, which the Railroad had not,) which might have been assigned or leased by the State; nevertheless the State had no right to sell or lease the property of the Telegraph Company; and if it had a special property in the wire, it thereby determined the contract with that Company, and parted with its limited interest, and its lessee rendered itself liable to be dealt with as a trespasser by receiving and using the property under such a transaction.

The law in England and this country is well settled, that a man who is not the owner of personal property, or who has only a qualified ownership, cannot by a pretended sale or lease transfer the title, though the transaction be in good faith on the part of the purchaser and for a valuable consideration, and without knowledge of the actual state of the title, and the taking or use of the property by the purchaser or lessee under such a transaction will be deemed tortious as against the real owner.

"The general rule of the law of England is that a man who has no property in goods cannot, by making a sale, transfer the property therein to another."
1 Chitty on Contracts, 534.

"A bailee can transfer no title beyond that lawfully and actually possessed by him."
Story on Bailments, § 322.

"According to Lord Holt, in *Baldwin* v. *Cole*, 6 Mod., 212, the very assuming to one's self the property and right

of disposing of another's goods is a conversion, and certainly a man is guilty who takes my property by assignment from another who has no authority to dispose of it."

Ellenborough, C. J., in McCombie *v.* Davis, 6 East, 540.

"If goods be let on hire, although the person who hires them has the possession of them for the special purpose for which they are lent, yet, if he send them to an auctioneer to be sold, he is guilty of conversion; and if the auctioneer afterwards refuse to deliver them to the owner unless he will pay a sum of money he claims, *he* is also guilty of conversion."

Abbott, C. J., in Lœschman *v.* Machin, 2 Stark., N. P. C., 311.

The doctrine that, if a bailee in possession of goods, having no authority to dispose of them, undertakes to sell them, he thereby determines the bailment, and causes the possessory title to revert to the general owner, and that the purchaser, although he buys in good faith, without knowledge of the state of the title, is guilty of trespass, and may be made liable in trover or trespass to the trne owner, was firmly settled in England by the following cases:

Cooper *v.* Willomatt, 1 Common Bench, 683.

Bryant *v.* Wardell, 2. Exch., 482.

Fenn *v.* Bittleston, 7. Exch., 157.

Farrant *v.* Thompson, 5 B. & Ald., 529.

Tindal, C. J., in *Cooper v. Willomatt*, said:

"If Savage (the lessee or bailee) put the goods into the possession of another, meaning to give to that other a larger interest in them than he himself possessed, he must, at all events, be held to have parted with the limited interest he did possess."

Pollock, C. B., in *Bryant v. Wardell*, speaking of *Cooper v. Willomatt*, said:

"It was there held that a bailee of goods for hire, by selling them, determines the bailment; and the bailor may maintain trover against the purchaser, though the purchase was *bona fide*. The rule is that, where there has

been a *misuser* of the thing lent, as, by destruction or otherwise, there is an end of the bailment, and the action of trover is maintainable for the conversion."

These cases were followed in *Fenn* v. *Bittleston*, where Parke, B., referring to them, said:

"It was held that the act of the bailee, in doing a thing entirely inconsistent with the terms of the bailment, though not amounting to a destruction of the chattel, was a determination of the lawful bailment, and caused the possessory title to revert to the bailor, and entitled him to maintain trover.

"The contract between these parties never meant to authorize Malpas, his executors or administrators, (not assigns,) to do more than use the chattels, and not to give them to a third person. The transfer of the property absolutely to a stranger was therefore unquestionably wrong, and operated as a disclaimer of tenancy at common law."

In this country the doctrine has been often affirmed, that the taking under a *bona fide* purchase from a bailee, or a person in the lawful possession of goods, but who has no right to sell or dispose of them, is an unlawful act against the true owner.

In *Emerson* v. *Fisk* (6 Greenl., 206) the court said:

"But suppose they had a special property, it could only be as bailees for a special purpose. They clearly had no authority to sell the logs. This would be entirely inconsistent with the rights of the plaintiff as the general owner. *By this unauthorized act the bailment, and their authority under it, was determined.* The defendants could derive no rights from the tortious acts of Michael & Alexander."

Crocker v. *Gullifer* (44 Maine, 491) was the case of a *lease* of property by a bailee, and it was held that the contract of bailment was put an end to, and that no title passed to the lessee.

The Supreme Court of New Hampshire, in *Hyde* v. *Noble*, (13 N. H., 499,) declared that the purchasing of property from one who has no right to sell, is such an assump-

tion of power over it, inconsistent with the rights of the owner, as renders the purchaser liable in trover or trespass.

The doctrine was exhaustively examined by Metcalf, J., in *Stanley* v. *Gaylord*, (1 Cushing. 542–551,) where a chattel was mortgaged by the hirer as security for his own debt; and it was held that the mortgagee was liable in trespass to the general owner, though he acted *bona fide*.

The law was there held to be, using the language of the Supreme Court of Maine in *Galvin* v. *Bacon*, (2 Fairf., 30:)

"Whoever takes the property of another, without his assent, express or implied, or without the assent of some one authorized to act in his behalf, takes it, in eye of the law, tortiously. His possession is not lawful against the true owner. He acquires no rights under his purchase.

"The purchaser is not liable to be charged criminally, because innocent of any intended wrong; but the owner may avail himself against him of all civil remedies provided by law for the protection of property. In the case before us the defendant came honestly by the horse, but he did not receive possession from any one authorized to give it, and is therefore liable *civiliter* to the true owner for the taking as well as for the detention."

The law in New York likewise holds a purchaser who takes possession of chattels, though in good faith, from one who has no title or right to sell them, liable to the true owner.

In *Austin* v. *Dey* (46 N. Y. 502) the court say:

"It is well established that neither an ordinary bailee of property, nor one having possession under an executory contract to purchase, can give a title thereto to a purchaser, although the latter acts in good faith and parts with value without knowledge or notice of the want of title of his vendor, or that third persons have claims upon the property.

The cases and authorities bearing upon the question were well considered in *Ballard* v. *Burgett*, 40 N. Y., 314."

In *Ely* v. *Ehle* (3 Comstock, 506) the court said:

"By selling the flour, Hays (the bailee) put an end to the privity of contract between him and the plaintiff, and

trespass or replevin would lie against him; and if defendant took the flour without delivery by Hays, although he purchased in good faith and for a valuable consideration, he stands in no better position; he is deemed to have taken the flour tortiously, and therefore trespass or replevin lies against him at the election of the plaintiff."

It is also well settled that where a contract of bailment is put an end to by sale or other misuser of the property, the owner has the right to claim and retake it wherever he can find it, if he can without committing a breach of the peace. (Sanborn *v.* Colman, 6 N. H., 15; Story on Bailments, § 396.)

IV. We maintain, therefore, in view of these principles, that the State of Georgia having no property in this wire, could not sell or lease it to the Railroad Company, and thereby confer a lawful right to use it for any purpose as against the true owner; that the right of possession, control, and use of the property for all purposes immediately revested, on such lease, in the Telegraph Company; that the acts of the pretended lessee in using the property, and withholding from that Company the use of it, and interfering to prevent that Company from exercising its right to assume control, and from enjoying the use, and income from the use, of the property, in its lawful business, are infringements of its rights, which a court of equity will restrain by injunction.

Third.

But if the lease of the railroad and its appurtenances is to be deemed a demise or assignment of the *contract* between the State and the Telegraph Company, and the right of user exercisable by the former under that contract, it is equally clear, upon the averments in the answer, that the Railroad Company is not in the lawful control or use of the property, and should be restrained as prayed in the bill.

I. If, by the construction and effect to be given to the lease, the rights of the State under the contract with our Company were vested in the Railroad Company, the obligations and liabilities of the State, under the contract, were also necessarily transferred to that Company.

Sharswood, J., in *Penn. R. R. Co.* v. *Sly*, (65 Penn. S. R., 209,) said: "The lessee is the assignee for the term or period of the lessor; *his bailiff to hold possession for him.* Co. Litt, 239, b, note 2: it is so as to a natural person, why not as to a corporation?"

Hence, it was there held, that the lessee of a railroad corporation, while it succeeded to the rights and privileges of the lessor, under its charter, was bound by all the prohibitions and limitations contained in such charter.

Cooley, J., in *McMillan* v. *M. S. & N. I. R. R. Co.*, (16 Mich., 102,) said: "*The power to lease does not imply the power to transfer greater rights than the lessor himself possesses.*"

Hence it was held, in that case, that the lessee of a railroad, under a demise made in virtue of the general law of the State, was bound by all the obligations and liabilities resting on the lessor.

And this court, in *Tomlinson* v. *Branch*, (15 Wall., 464,) held, that where one company was merged in another, all the obligations of the former to the public and to third persons remained and devolved on the new company.

Mr. Justice Bradley there said:

"In declaring that one company shall be merged in the other, and that the rights, privileges, and property of the one shall be vested in the other, the Legislature cannot be understood to mean that the restrictions, limitations, and burdens affecting that property, and imposed for the benefit of the public or of individuals, shall not go with it?"

So, in England, it was held that where a Railroad Company had an agreement with another Railroad Company for the use of the road of the latter, and the road of the

former Company was leased to a third Company, with the agreement referred to, the lessee Company succeeded to the rights and privileges of the lessor under that agreement, and *was subject to all the obligations and liabilities imposed by that agreement upon the lessor.* (L. and S. W. Railway Co. *v.* S. E. Railway Co., 8 Exch., 604.)

The Railroad Company, if this contract passed under the demise, was, therefore, placed thereby in the *shoes of the State*, and was bound to perform the contract in the same manner and to the same extent that the State, its lessor, was bound to perform it, if it would avail itself of the rights and privileges which the contract conferred.

If the rights and privileges of the State were transferred, the obligations and liabilities of the State also were transferred, to the Railroad Company.

The mutuality incident to the contract rendered the benefits and burdens inseparable, and if the Railroad Company acquired the former, it was subjected, of course, to the latter. It took subject to all the obligations on the part of the State; and if it would enjoy the benefits, it must also bear the burdens, of the contract.

The demise, if it passed the contract, could only put the Railroad Company in the place of the State under the contract, with all the terms and conditions and obligations which the State was before subject to, and could not enlarge or affect the scope of the contract or vary its construction.

II. The answer of the Railroad Company avers, however, as we have seen, that it announced its determination that it would *not* be bound by it, and would use the property as its own without any reference to any contract the State may have made in regard to it, and that it has used the property ever since as if it were its own, without reference to any limitations contained in the contract, and without performing anything agreed to be performed on the part of the State.

1. When the Railroad Company determined not to perform the contract, it was bound to restore the property to the Telegraph Company, and it had no right to interfere to prevent its resuming possession and control of it, or to exclude it from the enjoyment of it; nor had it a right to make use of it for any purpose, much less for the purpose of general telegraphing, to which it has been applied.

2. The contract on the part of the Telegraph Company, by the manifest intent of the parties, was conditioned upon the performance of the covenants entered into by the State. It would be a monstrous supposition that the Telegraph Company undertook to allow its telegraph structure, erected and maintained at great expense, to be used by the other party after it should cease to do what it engaged to do for the benefit of that Company. The performance, and not the promise, was the consideration on which the company relied in entering into the arrangement. And when, therefore, the Railroad Company who, it is supposed, succeeded to the contract, deliberately refused to be bound by its terms and conditions, it had no right to exercise any dominion over the property, or withhold it from its lawful owner, and no right to interfere to prevent the owner from resuming its rightful control and enjoyment of it, and taking the steps necessary to that end.

A man, said Lord Abinger, is entitled to make use of his property at *all times and in all places*, and if another have possession of it, he cannot lawfully refuse to deliver it up or assert *any* right inconsistent with the owner's general *dominion* over it. (Fouldes *v.* Willoughby, 8 Meeson & Welsby, 549.)

The Railroad Corporation, when it repudiated the contract, was in the position of a simple depositary, who has no right to use the property without the consent of the owner for any purpose. (Story on Bailments, § 89; Clark *v.* Gilbert, 2 Bing., N. C., 343.)

So, it is one of the primary duties of a bailee for hire to

restore the property to the owner at the time appointed, and to observe whatever is prescribed by the contract. (Ibid., § 397.) And it is a tortious misuser to use it after that time, or after the determination of the contract. The owners' right of possession being restored, he is entitled to have the actual possession.

In every view, therefore, of the relations of the parties, it was incumbent upon the Railroad Company, having determined not to fulfil the contract in question, at least to interpose no obstacle to the resumption by the Telegraph Company of its rightful control and use of this property.

3. But the appellee has not only used the property in its own proper business, contrary to its duty, and interfered to prevent our Company from resuming control over it, but it has also employed it in the general business of telegraphing for others and for its own profit. Such employment of the property was never contemplated as permissible under any circumstances by the contract under which this wire was placed in connection with the railroad stations.

This is not only a *misuser*, but a *mal* user or abuse of the property, which would be intolerable if the contract were otherwise observed by the Company, and which in its present attitude is an aggravated injury to our Company.

Such misuser, in the case of a bailment, upon the plainest principles, would put an end to the contract and destroy the special property, and authorize the owner to retake the property wherever he might find it, even before the time limited by the special contract. (Story on Bailments, § 395.)

And all this has been, and is being, done by appellee upon a pretended claim of ownership, and with denial of any title on the part of appellant, or any right to enjoy the use of the property.

III. In this view of the case also, the acts of the Railroad Company affecting this property are without the least color of authority, and should be restrained by injunction.

Fourth.

If the contract of August 18, 1870, did not pass to the Railroad Company under the lease, that Company is, of course, equally unwarranted in assuming the control and use of the property against the claim of its owner.

I. If the contract was not assignable, or, if assignable, was not intended to be assigned, by the true construction of the lease, or if the State had a right to determine and did determine it, or if, on the other hand, the contract was actually determined by the parties to it, so that the lease could not take effect upon it—in each case the Railroad Company is plainly in the control and enjoyment of this property without color of right.

That Company, as it claims under the lease, must claim according to the lease, and it has no right to anything not granted by the lease. If, for either of the reasons above mentioned, the contract did not pass by virtue of the lease to the Company, it can exercise no right conferred by the contract, and cannot avail itself in any way of the contract as a defense to this bill.

II. The theory of the Railroad Company, as has been seen, is that the lease purports to convey to it, not the contract, but the general *property* in this wire and its equipments, as an appurtenance of the road, owned by the State; and it follows necessarily from this view, that if the property did not and could not pass by the lease, no right in or to the wire and the equipments was transferred to the lessee.

We have already shown, under the *first* proposition of this argument, that the State acquired no property in the wire and equipments to sell or lease, and, therefore, could not sell or lease any to anybody, and under the *second* proposition of this argument, that if, having no title, it undertook to sell or lease the property, the Railroad Company stands in the position of a confessed trespasser.

The final result, therefore, is that whether the wire and equipments in question were leased or attempted to be leased by the State to the Railroad Company, or whether the lease was effectual to transfer the contract with regard to the use of that property to the Railroad Company, or whether, lastly, the contract did not pass, for any reason, under the lease, to the Railroad Company, that Company, by its own showing, is in the exclusive control and enjoyment of the property of the Telegraph Company without color of right or authority of any kind, and is amenable to all the processes of justice for this wrong.

Fifth.

We have proved, as we submit, under the *first* point of this brief, that the contract of August 18, 1870, between the Telegraph Company and the State was not an agreement for the sale of the wire and equipments in question. But we have now to observe, that if we should be in error in regard to the construction and effect of that contract, the title of the property, at all events, did not pass to the State until after the execution of the lease under which the Railroad Company claims, and the property was not, therefore, embraced by that lease.

I. The cost of constructing the wire in question, and equipping it, which the State agreed by its sixth covenant to pay the Telegraph Company, was not paid until the 20th of January, 1871, more than three weeks after the demise to the railroad corporation.

II. There is nothing to indicate that there was any appropriation of the property in question to the contract by mutual assent of the parties before this payment, and the law is clear that before such an appropriation, under an executory agreement, no title can pass.

The rule is, in the case of an agreement for the sale of chattels to be manufactured, or not specified, that the property does not vest in the purchaser until both parties have

assented to an appropriation. (Benjamin on Sales, 275; Godts *v.* Rose, 17 C. B., 229.)

The vendee must be shown to have actually accepted the particular goods appropriated by the vendor. (Moody *v.* Brown, 34 Maine, 109.)

Until payment was made and received, the Telegraph Company, for aught that appears, might have been at liberty to appropriate any other wire to the contract, and the State to refuse assent to any appropriation made by the Company. (Atkinson *v.* Bell, 8 B. & C., 277.)

III. But even if both parties assented to the appropriation before payment, it cannot be deemed to have been the intention of the parties that the title should pass before the payment of the cost of constructing the wire, and if so, the property did not vest until that occurred. (Tempest *v.* Fitzgerald, 3 B. & Ad., 680.)

Even where there has been an actual sale and delivery of goods, if it be understood that the property is not to vest until the purchase money is paid, the vendee is only a bailee for a specific purpose before it is paid; and the goods may be attached in the hands of a purchaser by creditors of the vendor. (Cogill *v.* H. &. N. R. R. Co., 3 Gray, 547.)

IV. There is no word in the lease under which the Railroad Company claims to show that the intention was to demise any property not owned by the State at the date of demise, or to pass after-acquired property; and the interest of the lessee is, therefore, limited to the appurtenances, and other property, actually owned by the lessor at the date of the demise. (Pennock *v.* Coe, 23 How., 117.)

Sixth.

The Railroad Company denies, however, though it be a a confessed trespasser, in the wrongful possession and enjoyment of this property, and the franchises annexed to it, and exercisable by the Telegraph Company in connection with it, that it is amenable to the process of a Court of

Equity for the arrest of the injury and the prevention of the wrong.

I. This court will have no sympathy with that sort of defense to a case like this of admitted injury and wrong to valuable property and franchises, where every day gives this appellant fresh cause of action against the appellee. The court will need to take, to sustain this bill, no step in advance of the doctrine of the opinion of Chief Justice Marshall, in the case of *Osborn* v. *United States Bank*, (9 Wheaton, 844–846.)

The general grounds of equitable jurisdiction in this case are the prevention of irreparable mischief, the suppression of a multiplicity of suits and vexatious litigation, and the less expensive and more speedy and satisfactory administration of justice between the parties than can be obtained in actions at law. (2 Story, Eq. Jur., ed. 1870, §§ 928, 932.)

II. The case is that of a line of telegraph, over a hundred miles long, in working order, consisting of poles, insulators, wires, batteries, instruments, and other fixtures, owned by the appellant, a Telegraph Company, whose lines extend throughout the United States, unlawfully controlled and operated by this appellee, to the total exclusion of the owner from all enjoyment of it, the profits derived from such use being appropriated by the trespasser, though they belong to the appellant, as owner not only of the corporeal property but of the incorporeal franchise also. It appears, further, that appellant, proposing to take the measures necessary and proper to regain possession and use of the property, has been threatened with forcible resistance by the appellee.

The case, in the first place, is, therefore, not one of the "casual trespass of an individual, who might not perform the act he threatened," but of an actual, continuing trespass, *where there is no privity of estate;* and, in such a case,

says Chief Justice Marshall, "*trespass is destruction.*" (9 Wheaton, 842.)

And, in the second place, it is a case of repeated injury to a privilege or franchise belonging to appellant, and which it alone is entitled to exercise in connection with the property in question; and, in such a case, also a court of equity is entitled to interpose its writ of injunction to prevent the repetition of the wrong and protect the privilege, upon the principle declared by this court in *Osborn v. The Bank.* As Chief Justice Marshall said, in that case, "to treat *this* as a common, casual trespass, would be to disregard entirely its true character and substantial merits." (9 Wh., 840.

The injury inflicted by denying to the appellant the exercise of its franchise by the free use of this property, and by the employment of it by appellee in a competition with appellant in general telegraphing for the public, is as difficult to calculate as the injury done by participating in an exclusive franchise; and in the latter case, as is shown in *Osborn* v. *The Bank,* it is the common course of a Court of Equity to interfere to prevent the violation of the privilege by participating in it. (9 Wh. 341.)

In *Osborn* v. *The Bank* it was conceded that an action at law could be maintained for the injury inflicted on the Bank, and that the materials existed on which a verdict might have been founded and judgment rendered, and yet the court held that the wrong, being of a *continuing* and not a casual, fugitive, or temporary character, was remediable in a Court of Equity.

"*Indeed,*" said Marshall, C. J., "*trespass is destruction, where there is no privity of estate.*" And it was on this ground that the court interposed there; and on the same ground we ask it to interfere here.

To oust the jurisdiction of a Conrt of Equity the remedy at law must be *as* practical and *as* efficient as the remedy

in equity, not merely to the ends of justice, but to its *prompt administration*. (3 Peters, 215.)

But it is never so where the direct proceedings in equity will save *time, expense, and a multiplicity of suits* (Oelrichs *v.* Spain, 15 Wall., 228.)

It would seem absurd to turn this Telegraph Company over to its actions at law, for past and future injuries on the part of the appellee, when a single suit and a single decree in equity will enable it to regain the control and use of its property and prevent the continued repetition of the wrong.

It would be the means of bringing about the very multiplicity of suits which equity will prevent by injunction.

III. The equity jurisdiction in cases of trespass has been greatly extended by modern chancellors. (Livingston *v.* Livingston, 6 John. Ch. R., 499; Ryder *v.* Williams, 4 L. J. Ch. N. S., 55; Clowes *v.* Beck, 13 Beav., 347.)

The rule everywhere now is to grant an injunction: (1.) Where the injury is irreparable, or not well susceptible of being compensated in damages. (2.) Where the injury, from its continuance, or permanent mischief, must occasion a constantly recurring grievance, as where loss of business may or will ensue.

No inquiry before a jury could fully ascertain the damages sustained and to be sustained by the Telegraph Company by being deprived of this wire. The damage is not measured by the loss of tolls taken on the wire. The wires of the Company extend throughout the United States. It would be impossible to estimate the injury it has suffered and will suffer (if an injunction is refused) by being deprived of the use of this wire in connection with the other lines of the Company. The damage capable of distinct proof would not be adequate compensation, for it is easy to see it might not and probably would not be the real damage.

Seventh.

But if we should be all wrong, in the opinion of the court, in the views expressed in the foregoing argument in regard to the construction and effect of the contract of the 18th of August, 1870, between the Telegraph Company and the State, and even if the court should think that contract was a sale of the wire, and that it passed under the demise to the Railroad Company, still we maintain that the Railroad Company has no right to use the wire and other property in question for any purpose except the transmission of legitimate railroad messages on and along the line of the road.

In the case of the absolute sale of property, it has been often held that an agreement by the purchaser to use or abstain from using the property in a particular manner, will be enforced in equity against subsequent purchasers even, with notice of the agreement, without reference to the question whether it ran with the property. (Tulk *v.* Moxhay, 2 Phillips, 774; Thomas *v.* Pool, 7 Grey, 83.)

An objection that the Railroad Company, assuming that the contract passed the title to the State, had no notice of any agreement affecting and restricting the use of the property, and could not be bound by it, would be futile, (1) because a lessee does not stand in the position of a purchaser, and the effect of the lease was merely to transfer the possession, while the estate remained in the lessor, (a lessee being the *lessor's bailiff to hold possession for him*,) and (2) because the possession of the wire by the Telegraph Company, the wire being on its poles, was sufficient notice to all the world of the right of that Company.

Possession is sufficient notice of any claim which the party in possession may have on the property. (Sugden Vend., 1052; Boone *v.* Chiles, 10 Pet., 224; Woods *v.* Farmers, 7 Watts, 382.)

The inference that the Telegraph Company had a claim

was not only probable, but necessary and unquestionable, from the fact that the wire was erected on its poles, and passed into its offices along the line of the road.

But it is unnecessary to pursue this subject, for we regard it demonstrably clear that there never was any intention on the part of the Telegraph Company and the State to change the title of the property, and that their contract was not a contract of sale.

Eighth.

The case presented by the *original bill* of the Western Union Telegraph Company having been thus discussed, there only remains to consider the decree of the court below dismissing the *cross-bill*, from which the Railroad Company appeals.

The Telegraph Company asks that that decree be affirmed.

I. The court must affirm it as matter of course. The Railroad Company have assigned no errors thereto, so far as we observe, in conformity with the rule of the court.

II. But upon the merits of the case made in the cross-bill, it is easy to see that it is an impertinent intrusion upon the case on the part of the Telegraph Company presented in the original bill. It violates every well-settled rule in regard to cross-bills. (Story's Equity Pleading, §§ 401, 631; Ayers *v.* Carver, 17 How., 595.)

The cross-bill contains numerous matters not in litigation in the original bill, but new, distinct, and independent matters, which could only be made the subject of an original suit.

All the allegations and prayers of the cross-bill in reference to the right of way, the portion of the wire, instruments, &c., within the State of Tennessee, and the payment of damages, touch no subjects in question in the original bill.

The only prayer which touches any matter in question in the original bill is that in relation to the use of the wire from Atlanta to Chattanooga.

But it is manifest that the question between the parties in regard to the ownership and use of this property can be heard and properly determined upon the original bill and answer, without the intervention of any cross-bill, which is wholly unnecessary to the defense to the original bill, or to enable the court to adjudicate the rights of the parties touching the subject-matter of that bill. (Ayers *v.* Carver, 17 How., 595.)

The cross-bill was very properly dismissed by the court below.

Ninth.

It is respectfully submitted, therefore, that the decree dismissing the cross-bill should be affirmed, and that the decree dismissing the original bill should be reversed, and that the case should be remanded, with directions to the court below to grant an injunction, as prayed in that bill.

J. Hubley Ashton,
Grosvenor Porter Lowrey,
Of Counsel for the W. U. Telegraph Co.

SUPREME COURT OF THE UNITED STATES,

No. 273.

THE WESTERN UNION TELEGRAPH COMPANY, APPELL'T,

VS.

THE WESTERN & ATLANTIC RAILROAD COMPANY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF GEORGIA.

BRIEF

OF

Lucius Et JULIUS L. BROWN,

SOLICITOR FOR APPELLEE.

Dunlop, Wynne & Co., Printers, Atlanta.

THE WESTERN UNION Telegraph Company
VS.
WESTERN & ATLANTIC Railroad Company.

Appeal from U. S. Circuit Court Northern District of Georgia.
No. 273.
In Supreme Court of the United States.

BRIEF

OF

JULIUS L. BROWN,

Solicitor for Appellee.

I.

The real object of Appellant's bill is made very apparent by all the pleadings and proofs in this cause. It was to obtain possession of the telegraph wire, instruments, batteries and fixtures which had been bought and paid for by the State of Georgia out of her Treasury, (Record, pages 15, 16; MSS., 49, 50, 51,) and by the State leased, as an appurtenance of the Western & Atlantic Railroad, to Appellee, Record, pages 10, 11, 14; MSS. 30, 33, 34, 43. This is clear from the averments of the bill. It states that, on account of the refusal of Appellee to be bound by the contract made with the State before the lease, that it was "induced *to treat as revoked and withdrawn* all power and privilege on the part of Defendant to use said wire or the batteries, instruments and fixtures therewith connected, and all authority to send or receive messages by means of the same, or to collect or receive compensation therefor, *and accordingly it has sought to resume full possession and exclusive control of said wire, but has been hindered and obstructed by defendant in so doing.*" Record, page 4; MSS.

12. One of the prayers of the bill is "that Defendant may be *restrained from hindering, obstructing or molesting Complainant in severing said wire from each and all of the offices or depots* of said Defendant with which it is connected. Record, page 5; MSS. 17.

The allegations of the bill about the damages being irreparable and incapable of being ascertained at law, and the necessity for a multiplicity of suits to recover back money to be paid for freight and fare, etc., are merely colorable, and amount to nothing. For unless the contract made with the State's Superintendent of the Western & Atlantic Railroad, Blodgett, was binding upon Appellee, and was of force at the time this bill was filed, it could give Appellant no rights for such damages, etc., against Appellee.

Granting, for argument merely, that the contract was ever binding upon Appellee, we say it was not of force at the time the bill was filed in the Circuit Court, as is shown by Appellant's own bill. When Appellant, prior to February 9, 1872, and prior to the filing of its bill, (Record 4; MSS. 12,) "revoked the contract and withdrew" from it, as it says it did, *eo instanti*, that contract ceased to confer any rights upon Appellant, or to bind Appellee; and Appellant, after treating the contract as "revoked," is now estopped from claiming any rights under that contract in the future. Without that contract there can be no pretense that Appellee is under any such obligations to Appellant as charged, and hence there is no foundation for any such "irreparable damages," or necessity for such "multiplicity of suits," as charged.

The only other allegation that seemed to be relied on in the bill, to-wit: that Appellee is not authorized to engage in telegraphing, and that as against it Appellant has exclusive rights, (Record 4; MSS. 11,) is also untrue. By an act of the Georgia Legislature, approved December 29, 1847, entitled "An Act to authorize the construction of the Magnetic Telegraph, and providing for the protection of the same," it is declared in the first section thereof, "That *any company* or individual may erect posts and wires and other fixtures for telegraphic purposes, etc."

Georgia Laws, 1847, page 218.

But, independent of that statute, Appellant has shown no exclusive right of telegraphing in Georgia. It exists in Georgia only by comity, and is presumed to have no exclusive privileges.

Cooley's Const. Lim., *393, 394, 395.

Charles River Bridge vs. Warren Bridge, 11 Pet., 420, 546.

Hence I assert most positively that the only real object of this bill, was to recover possession of the telegraph property, and that all the statements of these other matters were, in the language of Chief Justice Marshall, in Russell vs. Clark's ex'rs, 7 Cranch, 89, "A mere pretext for bringing a cause proper," (if for any court) "for a court of law into a court of equity."

It is clear that if Appellant *owns* the wire, instruments, batteries and fixtures, all of which are personal property, and they are improperly detained from it, Appellant has a plain, adequate, complete and effectual remedy at law, by action of trover or trespass, to recover possession of the same. Having such a remedy, the Circuit Court very properly dismissed the bill, and that decree should not be interfered with.

This Court, in Parker vs. Winnipiseogee Co., 2 Black, 545, said: "It was urged at the hearing, as an insuperable objection to the relief prayed for, that the Appellant has not established his right by an action at law. The objection was not taken by demurrer or in the answer. In the Courts of the United States it is regarded as jurisdictional, and may be enforced by the Court *sua sponte*, though not raised by the pleadings, nor suggested by counsel. 2 Cr., 419; 5 Peters, 496; 2 How'd, 383. The 16th section of the Judicial Act of 1789 provides that suits in equity shall not be sustained in either of the Courts of the United States in any cause where a plain, adequate and complete remedy can be had at law." This is merely declaratory of the pre-existing rule, and does not apply where the remedy at law is not "plain, adequate and complete," or, in other words, where it is not as practical and as efficient to the ends of justice and its prompt administration as the remedy in equity. 3 Peters 215, 433. *But where the remedy at law is of this character, the party seeking redress must pursue it. In such a case the adverse party has a constitutional right to a trial by jury.* 19 How., 278."

To the same effect also are the decisions in Baker vs. Biddle, Baldwin, 416; Washington Railroad vs. Bradley, 10 Wal., 303; Russell vs. Clark's ex'rs, 7 Cr., 89; Oelrichs vs. Spain, 15 Wal., 211; Lewis vs. Cocks, decided at the present term of the Court. Thus much upon the idea that Apellant owns the property in controversy.

II.

But Appellant does not own the property in dispute, and is not entitled to its possession. It is the property of Appellees' lessor, the State of Georgia. Record 21, MSS. 68. It was purchased by the State, an itemized bill of its entire cost was presented by Appellant, and the State paid it after the lease to Appellee. Record, pages 11, 15, 16, 21, 24; MSS., 68, 33, 47, 49, 50, 51, 75.

The State had exclusive possession of it. Record, 1–10; MSS. 2–30.

It stood upon the poles upon the land of the State, to-wit: upon the right-of-way of its railroad. Record, 1, 4, 6, 7, 12 24; MSS., 11, 19, 21, 37, 74.

The State's officer, Blodgett, one of the parties to the contract, considered that the State had purchased the property. Record, 10; MSS., 30.

The State also considered it its property, and when the Western & Atlantic Railroad and its appurtenances were leased to Appellee it leased this property in dispute as one of the appurtenances of said Railroad; placed it upon the inventory of the property turned over to Apellee, Record 14, MSS., 43, and required of them a bond for its return. Record, 10; MSS., 31.

The State had, as we have seen, exclusive dominion over and use of this property.

When the exclusive use of a thing is granted, the thing itself is by such terms conveyed.

"If the grant be of the uses of, and dominion over land, it carries the land itself."

3 Wash. Real Prop., (ed. 1868) page 333, *622.

"But if a man seized of lands in fee by his deed granteth to another the profit of those lands, to have and to hold to him and his heirs, and maketh livery *secundam formam chartæ*, the whole land itself doth passe, for what is the land but the profits thereof?"

Coke, Littleton Lib. 1, Cap. I. of Fee Simple, section 1, 4 b, edition of 1794.

In Caldwell vs. Fulton, 31 Penn. St., Reps. 484, the Court say: "There are two modes in which the subject matter of a deed may be described, both equally potential; the one is by a description of the thing itself, as of lands by metes and bounds,

or by a known name; *and the other is by a designation of its usufruct or of the dominion over it.* Thus a grant of the rents, issues and profits of a tract of land is uniformly held to be a grant of the land itself."

Bear in mind that the State of Georgia, then operating the Western & Atlantic Railroad, had the wire set apart to its *exclusive use.* It had full possession of the property; it stood upon the State's land, and was on poles annexed to the State's freehold, and was attached to the State's depots and offices; the State had as full and complete possession of it as there could be of such property, and was operating the same; was paying employees to operate it at the time of the lease; the State too had paid every dollar of its cost after the lease to Appellee, and there can be no escape from the conclusion that this property belongs to the State of Georgia. If this is not the proper construction, then there was no *mutuality* in the contract, and it was void.

III.

But let us take another view of this case. Suppose the contract is not revoked and rescinded as stated in the bill, but that the same has all the force it ever had against the State, then we insist that Appellant cannot sustain its bill against Appellee, because Appellee is not bound for the contracts or torts of the State of Georgia prior to the date of the lease, unless it became so by contract. Section Four of the Lease Act, Acts of Georgia, 1870, page 425, expressly provides that Appellee shall be liable for its contracts made *after the execution of said lease*, and for any cause of action to which it may become liable after said lease is executed."

The State of Georgia, in Section One of said act, pledged her faith that she would not interfere with the lessees so long as they kept their contract; and in Section Eight of said act she made provision for *all* outstanding debts or liabilities of said Western & Atlantic Railroad; and in Section Twelve of said act the State pledged her faith to hold the lessees harmless against the bonds having a mortgage on the road. From all these sections it is clear that the State did not intend for the lessees to assume her obligations, and in contracting to lease said road they did not assume them.

It is clear that Appellee is not bound in any way to Appellant by express contract, because it made none. Record, 2;

MSS., 6. It expressly refused to be bound by the contract with the State. Record, 14, 15. It offered to make a contract on fair terms, but the offer was not accepted.

But it was insisted that the contract made with the State is a *covanant real*, and passed with the Western & Atlantic Railroad when it was leased by the State of Georgia to Appellee, and that Appellee was thus bound by implication.

I deny that the proposition is sound. It is not a covenant real unless land is conveyed to Appellant.

In Pike vs. Galvin, 29 Maine, 186, the Court say: "But a covenant which may run with the land can do so *only* when the land is conveyed. It can only run when attached to the land as its vehicle or conveyance." The Court cite many cases to the same effect.

The Court, in Allen vs. Wooley, 1 Blackford, 150, also say: "But the covenants could not pass with the land unless the land also passed to carry the covenants with it." To the same effect are Louis vs. Ridge, Cro. Eliz., 863; Brickford vs. Bridge, 2 Mass., 460; Slater vs. Ranson, 1 Met., 390; Randolph vs. Kearney, 3 Rand, 394, and 4 Kents Com., *472–3, note b, 2 Wash. R. P., 263.

Lord Kenyon, in Webb vs. Russell, 3 T. R., 402, said: "It is not sufficient that a covenant is concerning the land, but, in order to make it run with the land there must be a privity of estate *between the covenanting parties.*" So also held in Spencer's case, 5 Coke, 18 a., Bally vs. Wells, 3 Wils., 29; Platt on Covenants, *461; Ross vs. Turner, 2 Eng., 132; Plymouth vs. Carver, 16 Pick., 185; Morse vs. Aldrick, 19 Pick., 453–4; Hurd vs. Curtis, 19 Pick., 459; 2 Wash. R. P., 262, 263.

I deny that any land was conveyed by the Governor, or the Superintendent of the Western & Atlantic Railroad, to Appellant by the contract, and I assert that no land could be conveyed by them to the Appellant. Both of those officials were public officers, having certain specially defined powers.

The only authority the Governor of Georgia has to convey land of the State is found in section 64 of the Code of Georgia, (ed. 1868) and is as follows: "He shall issue all grants to lands *under the laws of this State*, but such shall not be conclusive, but subject to the investigation of the Courts," etc. There was no law of force allowing him to convey any part of the right of way of the Western & Atlantic Railroad, or any interest therein, when that contract was made. The powers of the Superintendent of the

Western & Atlantic Railroad were all laid down and specially defined in section 975 of the Code of Georgia, (ed. 1868) and none of them give him authority to convey any part of the right of way of the Western & Atlantic Railroad, or any interest therein.

Section 967 of the Code of Georgia says: "The railroad communication from Atlanta, in Fulton county, to Chattanooga, on the Tennessee river, is the property of this State *exclusively*, and shall be known as the Western & Atlantic Railroad."

I insist, further, that whatever power to act concerning the Western & Atlantic Railroad not specially delegated to the Governor of Georgia, or the Superintendent of said road, belongs to and must be exclusively exercised by the legislative power of the State. The power to grant or create in Appellant a perpetuity in the use of the right of way of said railroad for telegraph purposes has never been by legislative authority delegated either to the Governor or the Superintendent of said road, nor to any other person; nor have the acts of the Superintendent in making said contract above ever been ratified or made valid by the legislative authority of the State. The approval of the Governor did not impart validity to the same, or create any binding obligation upon the State. To make said contract binding, legislative sanction was absolutely required. If the Governor and Superintendent had the power to create a perpetuity in the use of the right of way of said road, without legislative authority, he might have *sold* or *leased* the entire railroad and its appurtenances. But the Superintendent had no such power over the property of the State, even with the approval of the Governor. His powers were limited and restricted; and to show that the Legislature never intended to confer upon the Superintendent such great and unlimited power to encumber or dispose of the right of way of said road, as insisted by Appellant, and that all such power rests exclusively in the legislative power of the State, I cite the Act of October 25, 1870, of the Legislature of Georgia, Acts of 1870, p. 377, where the power is granted to the Superintendent, in certain specific cases, one to grant the proprietors of the Kennesaw House the right to rest the pillars of the verandah of said house upon the right of way of said road, under certain limitations and restrictions. And the other, Acts of 1870, pp. 377–8, to convey to the Macon & Western Railroad Company certain lands of said Western & Atlantic Railroad in exchange for other lands, and

also the Act of October 27, 1870, (Acts of 1870, p. 423) authorizing the Governor of Georgia to lease said Western & Atlantic Railroad. These Acts all show that the Superintendent and Governor had no authority to make said contract, and that the same is absolutely void—certainly so far as it may be claimed it attempts to convey any right in the right of way to Appellant.

Therefore, inasmuch as the contract made by Appellant with the Superintendent of the Western & Atlantic Railroad, with the approval of the Governor, did not and could not convey to Appellant any right or title whatever *in or to* the land of the right of way, the contract was not a *covonant real*, which passed with the Western & Atlantic Railroad, when it was leased to Appellee, and therefore Appellee is not bound by it.

If this contract is a covenant at all, it is a personal covenant, and is binding only on the maker thereof, the State of Georgia. If the State of Georgia, by reason of having leased the road, is unable to comply with the same, the State of Georgia and not Appellee, is liable to Appellant therefor. The State of Georgia has made provision for this liability in Section Eight of the Lease Act, approved October 27, 1870. Acts of 1870, page 426.

In that act express provision is made for the satisfaction of *all* claims against the State on account of said Western & Atlantic railroad, as follows:

"SEC. 8. *And be it further enacted*, That in case it shall be found that there are other outstanding or floating debts or liabilities of said Western & Atlantic Railroad due, or to become due, to any person or persons at the time said lease is made, they shall be paid by his Excellency the Governor out of the treasury of the State; and the Governor is hereby authorized to draw his warrant upon the treasury for such sum or sums as may be found due, to be paid out of any money in the treasury not otherwise appropriated, which is hereby appropriated for that purpose, which is to be replaced by the monthly payments made by the lessees of the road as soon as a sufficient sum is due from said lessees: *Provided*, That the Governor shall in no case draw his warrant on the treasury in favor of any such claimant, for any unliquidated demand, until the claim is audited and approved by a board of three commissioners, to consist of Benjamin Conley, Dawson A. Walker and George Hillyer, Esqrs., or a majority of them, or until the claim has been verified by a judgment of the court having jurisdiction of the case, when it shall be paid out of the treas-

ury, as above provided. But no claim shall in any event be allowed by said commissioners, or paid by the Governor, that has been rejected by the judgment of the court having jurisdiction of the case, or by the action of the Legislature; nor shall any claim be paid which falls within the class rejected by the decisions of the Supreme Court of this State, on account of their connection with the rebellion, or of the injury having been received while the claimant, or person injured, was engaged in the rebellion; nor shall any claim be paid which is embraced in the Ordinance of Repudiation passed by the Convention of 1865."

Now, bear in mind, also, that the amount paid Appellant by the State for this wire, etc., as stated in the Record, pages 15 and 16, MSS. 49–50, was paid *after the lease to Appellee*, as a liquidated demand, under and by virtue of the authority given in that very section.

If the State, by leasing its property, made it impossible to comply with its contract, and thus it became liable to Appellant for its failure to carry it out, Appellant had its remedy, and should have made its claim for damages under Section Eight above. It can have no claim on Appellee to comply with the State's personal covenants. In Taylor vs. Owen, 2 Blackford, 301, the Court say: "A *bona fide* vendee or lessee of real estate is not affected by personal covenants, and the circumstance of his having notice of it makes no difference." In our case Appellee had no notice of this contract until after the lease. Letter of Joseph E. Brown, Record 14–10, MSS. 45–31.

IV.

But take another view of this case. Grant for argument that Appellant is entitled to the property, then Appellant is certainly not entitled to both the property and also to the money it cost. It says it is willing to do equity, but makes no tender of the money back. If it can ever obtain the property it can only do so after it has refunded to Appellee the money paid by the State to Appellant for the property.

Story Eq. Jur., § 707. Hogan vs. Weyer, 5 Hill., 389, 390, 391.

Towers vs. Barrett, 1 Term Rep., 133; 5 John, 86.

Masson vs. Bovet, 1 Denio, 69, 74.

This it has not done, nor has it ever made any offer to return the money. Appellant only *says* it is willing to do equity, but it *does* nothing.

The Court did not err in refusing the injunction, by its order on page 21 of the Record, MSS., 68, neither did it err in dismissing Appellant's bill. Record 25, MSS. 16.

An injunction will not be granted, except in cases where an appellant's right is clear, and the damage irreparable.

Coffeen vs. Brunton, 5 McL., 256.

Perry vs. Parker, 1 W. & M., 280.

Doughty vs. West, 1 Fisher, 152.

Hilliard on Injunctions, 347; 14 sec., 16.

The use of the wire, instruments, batteries, etc., is not necessary to Appellant's business, and it does not aver that any injury to the property is apprehended, and that Appellee would not be able to make good any injury to the same in damages. Record 12, MSS. 37.

An injunction will never be granted where the right depends upon a contract of doubtful construction.

Smith vs. Selden, 1 Bl. C. C., 475.

And especially so when the granting of it will do great damage to Apellee. "The use of the wire, instruments, etc., is absolutely necessary to the safe and successful running of Appellee's road." Record 12, MSS. 38.

Hilliard on Injunction, 19, Sec. 22.

Appellant should have no injunction until his right to the property is established by an action at law.

The case must be one of strong and imperious necessity, or the right must have been previously established at law. The right must be clear and its violation palpable.

Parker vs. Winnispeogee Co., 2 Black, 552.

If the evidence be conflicting and the injury doubtful, this extraordinary remedy will be withheld.—*Ibid.*

An injunction will not be granted when all the equity has been sworn off, as in this case.

Poor vs. Carleton, 3 Sumner, 70.

Haight vs. The Proprietors, 4 Wash., C C., 601.

The answer of Appellee and the exhibits thereto swear off all the equity in the bill.

Appellee denies that it received the wire, instruments, batteries and other fixtures described in Appellant's bill under any contract with Appellant, and denies ever having used the same under any such contract, and denies ever having done any act that was intended to be, or that could fairly be, construed to be

an acceptance of said contract, or of any of its terms or stipulations; on the contrary, Appellee had no knowledge of the existence of any such contract or of any contract at all between the Appellant and the State of Georgia in regard to said property, until long after the same had been delivered to Appellee as an appurtenance of said road under the lease aforesaid. Record 10, MSS. 29–30.

V.

Appellant has not in the pleadings or proofs shown that it has any power to make the contract it insists upon. It avers that it is a citizen of New York; if so it exists in Georgia merely by comity. It did not produce its charter to show its powers.

Section 1675 of the Code of Georgia says: Corporations created by other States, or foreign governments, are recognized in our courts *only by comity*, etc.

In the Bank of Augusta vs. Earle, 13 Peters, 520, 587, this court say: "It may be safely assumed that a corporation can make no contracts, and do no acts, either within or without the State which creates it, except such as are authorized by its charter; and those acts must also be done by such officers or agents, and in such manner as the charter authorizes. *And if the law creating a corporation does not, by the true construction of the words used in the charter, give it the right to exercise its powers beyond the limits of the State, all contracts made by it in other States would be void.*"

And in Runyan vs. The Lessee of Carter et al., 14 Peters, 129, the Court say: "The corporation must show that the law of its creation gave it authority to make such contracts. * * * Every power, however, which a corporation exercises in another State depends for its validity upon the laws of the sovereignty in which it is exercised, and a corporation can make no valid contract without the sanction, express or implied, of such sovereignty." * *

And in Executors of McDonough vs. Murdock, 15 How., 413, the Court say: "This Court, in the case of the Bank of Augusta vs. Earle, 13 Peters, 520, said that by the law of comity among nations, a corporation created by one sovereignty is permitted to make contracts in another, and to sue in its courts; and that the same law of comity prevails among the several sovereignties of the Union. This comity is presumed from the silent acqui-

escence of the State. Whenever a State sufficiently indicates that contracts which derive validity from its comity are repugnant to its policy, or are considered as injurious to its interests, the presumption in favor of its adoption can no longer exist. These principles were applied to a purchase of lands by the corporation of one State in another, in 14 Peters, 122." The State of Georgia, by leasing the Western & Atlantic Railroad to Appellee, has withdrawn that comity so far as privilege to remain upon that road is concerned.

In the case at bar, we have the extraordinary spectacle of a corporation coming into Georgia through the courtesy of the State, attempting to assert an unjust and unfounded claim to property it sold the State and got its pay for, when that property is in the hands of the State's lessees!! As well expect a merchant to come into your house by your silent acquiescence, and then when there lay claim to the furniture he sold you and got his pay for!! Thus much have we to say to the case made by the original bill.

BRIEF UPON THE CROSS BILL.

In Ayres vs. Carver, et al., 17 How'd, 595, Judge Catron says: "In this instance the bill and cross bill are but one suit, and ought regularly to have been heard at the same time, and if an appeal was prosecuted from the decree to this Court by any party who supposes himself to be aggrieved, the whole suit would necessarily be brought up."

The *Court* say: "It is said by Lord Hardwick that both the original and cross bill constitute but one suit, so intimately are they connected together."—*Ibid.*

In Field vs. Schieffelin, 7 John Ch., 252, Chancellor Kent says: "According to Lord Hardwicke, (Kemp vs. Mackrell, 3 Ark., 812,) the first cause and the cross bill are but one cause."

Such being the law, there was really no use for a separate appeal by Appellee, as the cross bill would have come up by Appellant's appeal.

We insist that the cross bill was properly filed, that it was in this cause a proper mode of defence, and that the Court erred in sustaining the demurrer thereto, set forth in Record 22, 23, MSS. 70–71. The cross bill shows how the Appellee was chartered

and organized under the laws of Georgia; how by the Lease Act it was to take the Western & Atlantic Railroad and its appurtenances free from all liabilities of the State; how possession of the road and its appurtenances was delivered over to it; how there was invoiced to Appellee and turned over with said road as one of the appurtenances thereof, a telegraphic wire running on the right of way of said road from Atlanta, Georgia, to Chattanooga, Tennessee, together with instruments, batteries and other fixtures, all of which had been constructed under contract, and had been delivered to and fully paid for by the State of Georgia, while said road was under the management and control of said State; how Appellee became responsible by bond to return to the State of Georgia, at the expiration of said lease, the said wire with its equipments, as well as the road and all other appurtenances thereof. Record 17, MSS. 55. The cross bill further shows that upon Appellee coming into possession of said road, it found Appellant, with its line of poles, etc., upon the right of way thereof from Atlanta to Chattanooga; that it by sufferance permitted Appellant to remain there; how it soon found that Appellant claimed a right to be there under the contract named in the bill; and how it also claimed a right to the wire, etc., leased by the State to Appellee. The cross bill further shows that Appellant *undertook to take said wire out of Appellee's possessson*, and when it discovered that it would not be permitted to do that without resistance, it commenced various *ex parte* legal proceedings in the State of Tennessee, of which Appellee had no previous notice, by means whereof Appellee was wrongfully deprived of the possession and use of a portion of the wire included in the lease aforesaid and the instruments with which to operate the same included in said lease. And Appellee further shows that by such illegal seizure and interference Appellant has rendered Appellee unable to keep up telegraphic communication along said road, and at the stations and between the terminal points thereof, as to the movements and running of the trains of Appellee on said road, thereby producing constant danger of collisions, destructive to the trains, cars and engines of Appellee, and hazarding greatly the lives of the officers and employees of said company passing upon said trains, and the passengers traveling upon said road, and has compelled Appellee to resort to other means much less safe in their character, to avoid danger in conducting its business over that portion of the road lying in the State of Tennessee.

And Appellee further averred that if said telegraphic communication is not forthwith restored by the order of the Court to Appellee, that it apprehends irreparable damage resulting from collisions caused by the interruption of said telegraphic communication. Record 18, MSS. 57–58.

Appellee further averred that Appellant has continued temporarily upon the right of way of said road by *sufferance only;* and now, since Appellee is unwilling for it to remain thereon any longer, it is an intruder, and ought to be ejected therefrom; that this honorable Court having obtained complete jurisdiction of the whole subject matter by the filing of Appellant's bill as aforesaid, Appellee prays that, until a final hearing, Appellant be enjoined from going upon the right of way of Appellee, and also from using the wires along said right of way for the purpose of telegraphing, or for any other purpose, *and that Appellant be further enjoined from interfering with the use of the wire and all its appurtenances, extending from Atlanta to Chattanooga along said railroad and upon its right of way, so purchased and paid for by the State, and so granted, leased and delivered by the State of Georgia to Appellee;* and that Appellant be compelled to restore to Appellee that portion of the wire, instruments, batteries and fixtures being within the State of Tennessee; and that, on the final hearing, Appellant be *perpetually enjoined*; and that Appellant be decreed and compelled to pay to Appellee such damages for interference with and destruction of the rights of Appellee as may seem to the Court to be equitable and just; and that Appellant be declared to be an intruder on said right of way, and may be by decree expelled therefrom; and that such other and further relief may be granted as the nature of the case may require, etc. Record 18–19, MSS. 59–60.

Appellant demurred to the cross bill *as such.* By its demurrer Appellant admits all the facts stated as true.

It will be perceived that there are five prayers in the cross bill: one is for temporary injunction, to restrain Appellant from interfering with the use of the wire and all its appurtenances, etc.; another is that, upon the final hearing, that said injunction be made perpetual; the third is that Appellant pay Appellee damages; another is that Appellant be declared an intruder, and ejected from the right of way; and the last is for general relief.

Now, if among these there be a single one that is founded upon a sufficient allegation in the cross bill, "that calls for ap-

propriate relief touching the matters of said original bill," then the Court erred in sustaining the demurrer.

The pleadings and evidence in this cause show that Appellant was proceeding violently to cut the wire, etc., which are the subject matter of this controversy, from the offices and depots of Appellee, and that it only ceased to do so when it was notified that force would be met with force. (See letter of Connor, Record 24, MSS. 75; Record 4, MSS. 12–13; Record 5, MSS. 16; Record 11, MSS. 34; Record 18, MSS. 57.) Appellant then filed its bill with a prayer that Appellee be enjoined from hindering it in severing said wire from each and all the offices or depots of Appellee with which it might be connected. Record 5, MSS. 17.

Now Appellee files its cross bill and shows how exceedingly important to the road is the free and uninterrupted use of that wire, etc.; and also shows that Appellant is seeking to interfere with that use; and it prays that Appellant be commanded to desist from its interference.

When it is asked that we be enjoined from hindering or obstructing Appellant from severing the wire by force from our depots, we show that Appellant has no authority to remove the wire, and we ask that Appellant be enjoined from seeking to sever that wire, and we think this was a proper prayer and a proper defence to the original bill. Suppose Appellant should now attempt to interfere with our use of that wire, what is to prevent it doing so? We think that the Court, by its decree, ought to have forever settled the controversy about *that property*. If it had granted us the decrees we asked, it would have done so.

In 1 Bouvier's Law Dictionary, page 184, title, Bill, 23, 2d (ed. 1848) a cross bill is defined as one "which is brought by a defendant in a suit against the plaintiff respecting the matter in question in that bill." So also defined in Crosse vs. DeValle, 1 Wallace, 14. Our cross bill comes clearly within those definitions. The cases I cite, where a cross bill has been filed and approved by the Courts, do not come any more clearly within the definition.

In Peavy vs Schenck & Bliss, 1 Woolworth's C. C. Reps., 175, Mr. Justice Miller held that when S. files a bill against P., and B. asking that his title be quited against P., and as to B., that a partition be decreed, and P. desiring to have the title to both S. and B. declared void, a cross bill was the proper remedy.

The case of Ford vs. Douglas, 5 Howard, 143, was a bill filed by certain persons claiming title to property in question under a judicial sale, and alleging that defendants were proceeding to levy on the property under fi. fa. against the former owner. Defendants, in their answer, set up that the order of sale was obtained by fraud, and therefore void. Complainants denied an injunction, and defendants wished the order of sale and the sale itself held void. The Court held that a cross bill was the proper remedy.

In Missouri vs. Iowa, 7 How'd, 660, the State of Missouri filed a bill against the State of Iowa, claiming that Iowa was intruding upon the territory of Missouri. Iowa filed a cross bill denying that the claim was well founded, and setting up a right to certain of the territory *within the supposed limits of Missouri.* The Court, on page 667, say: "That a bill and cross bill is deemed the most appropriate mode of proceeding applicable to cases like the present, as it always offers an opportunity to the Court of making an affirmative decree for the one side or the other," etc.

In Carnochen vs. Christie, 11 Wheaton, 446, it was held that when a bill is filed to set aside a conveyance, a cross bill to establish the conveyance was a proper practice.

I insist also that the other prayers of our cross bill were proper for defence. Appellant had no authority to intrude itself upon our right of way and then seek to take possession of our property. The only authority by which it claimed to do so was the contract set forth and introduced in the original bill, which was, as we have seen, revoked and rescinded before the original bill was filed. Therefore Appellant did not show any authority at all to be upon this right of way.

The Act of Congress of July 24, 1866, providing that telegraph companies may construct their lines over the public roads, did not and could not authorize it to stay upon this right of way. *It* was expressly held by Drummond, J., in the case of the Atlantic & Pacific Telegraph Company vs. the Chicago, Rock Island & Pacific Railroad Company, published in the Chicago Legal News, page 358, August 1, 1874, not to apply to a case of this kind. Judge Drummond says: "The right to construct a telegraph line implies the possession, control and use of *real* property, and in this case of the possession, control and use of a portion of the *right-of-way* of the defendant. The question here is, whether Congress intended that in such a case as is now before the Cour

any telegraph company could, without compensation to the railroad company, exercise these rights of possession and ownership. I think that such cannot be considered the true construction of this Act of Congress of 1866. * * * * * *

"The railroad itself has the right to pass its cars and engines over its roadway, and to use it for the profit of ils shareholders. The right to construct a telegraph line would imply the right to construct another railroad, or to add indefinitely to the number of telegraph lines that might be placed over the right-of-way. The right of the telegraph company to construct its line over the right-of-way of the defendant is a right inconsistent in many respects with that absolute right which defendant possesses over its road-bed and right-of-way. For example the road has the right to take gravel and dirt throughout the *whole extent* of its right-of-way, or to use that right-of-way for the purpose of laying down additional tracks or side-tracks. But the right to construct a telegraph line thereon necessisarily interferes with the right of the railroad to its right-of-way. That is a right which cannot be taken without compensation. It is a right of property existing in the "railroad company, which no person or other company can take from it without its consent or without paying for it."

Neither can a telegraph company construct its line upon the right-of-way of a railroad in Georgia without paying compensation therefor, as was held in the case of the Southwestern Railroad Compan vs. the Southern & Atlantic Telegraph Company, 46 Ga. Reps., 43. Therefore it is clear that Appellant is a mere intruder on Appellee's right-of-way, and has no authority to be there longer. The Appellant, by the contract annexed to its bill as an exhibit thereto and as a part thereof, brings the question of its right to stay upon that right-of-way before the Court, and we think the cross-bill introduced no new matter before the Court in asking that Appellant be decreed an intruder, and ordered therefrom.

Having the whole cause before it, the Circuit Court should have decreed Appellee complete relief, and should therefore have decreed the injunction asked, and should have ousted Appellant from our right of way. It therefore erred in dismissing our cross bill.

Respectfully submitted.

Joseph L. Brown.

JULIUS L. BROWN.
Solicitor for Appellee.